New York's Used-Car Lemon Law: An Evaluation

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I. INTRODUCTION

On July 27, 1984, New York became the first state in the United States to enact a used-car "lemon law."1 New York General Business Law section 198-b, effective November 1, 1984, requires dealers to give consumers a minimum written warranty2 when they buy a used car costing $1,500 or more.3 Under the warranty, dealers must either repair without charge, replace, or give refunds for used cars that turn out to be lemons.4

The used-car lemon law was passed because of a perception that existing remedies to protect used-car buyers were inadequate. The law conforms with the growing pattern of consumer automobile-sales legislation in the United States, a trend evidenced by the surge in enactment of new-car lemon laws5 and by the promulgation of the federal "Used Motor Vehicle Trade Regulation Rule."6

When a major purchase such as an automobile turns out to be a lemon, spending more time in the repair shop than on the road, the results for the consumer include not only economic loss but psychological trauma, inconvenience, and wasted time. State legis-

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2. If the car has over 36,000 miles, the warranty lasts for 30 days or 1,000 miles. If the car has under 36,000 miles, the warranty lasts for 60 days or 3,000 miles. Most essential mechanical parts are covered. See P. Bienstock & S. Mindell, Lemonaid for Used Car Buyers (no date) (a pamphlet available from the New York State Department of Law's Office of Public Information). See also infra notes 131-62 and accompanying text.

3. The law was amended in 1985 to exclude from its coverage used motor vehicles with over 100,000 miles if that mileage is indicated in writing at the time of the sale. 1985 LAWS OF N.Y. 794 (codified as amended at N.Y. GEN. BUS. LAW § 198-b(d)(3) (McKinney Supp. 1987)).


5. See infra notes 82-99 and accompanying text.

latures enacting lemon laws recognize "that a defective automobile causes economic losses beyond those associated with its decreased value because Americans depend so heavily on their automobiles for transportation."  

New York's used-car lemon law is a response to the problems faced by consumers who, having purchased a used car from a dealer, find that they have received considerably less value than they had bargained for. The law is an important protection of consumers who, though seeking out professional used-car dealers to avoid the pervasive caveat emptor attitude implicit in the individual-seller situation, find only that when problems arise, they face major obstacles in enforcing their legal rights against dealers. The statute does not place a great burden on dealers, since the longest warranty which can be required by the law is sixty days. The law merely serves to protect consumers' legitimate minimum expectations regarding their used cars. The law ensures that, if a consumer spends over $1,500 on a car which fails in the first one or two months and cannot be repaired by a reasonable attempt, he will have rights against the dealer and a means to effectively enforce them. On paper, the law adds little to the statutory protection provided prior to its enactment. Its value lies in its clarification of consumers' rights with respect to used vehicles, as well as in its facilitation of recovery by aggrieved buyers. The law focuses specifically on the used-car buyer's situation and sets forth presumptions designed to alleviate the difficult proof problems previously faced by consumer plaintiffs. Though state law does not protect a consumer's economic expectations with respect to used goods in most situations, the automobile differs from most

8. N.Y. GEN. BUS. LAW § 198-b(b)(1)(a) (McKinney Supp. 1987). The dealer may, of course, voluntarily provide greater warranty coverage than required by this law.
9. Id. § 198-b(c).
10. Id. § 198-b(f).
11. See infra notes 114-24 and accompanying text.
12. The doctrine of caveat emptor still prevails in the individual-seller situation. See infra note 231 and accompanying text. In the professional-seller situation, where the buyer may be protected, the exception is seen as a lesser one than that of a consumer buying new goods, and consequently may be underestimated, particularly in the area of automobile sales. See infra notes 21, 105 and accompanying text. See generally Comment, Uniform Commercial Code-Implied Warranty of Fitness for a Particular Purpose-Applicability to the Sale of Secondhand Goods, 6 WHITTIER L. REV. 499 (1984). A consumer's safety expectations, how-
goods both in terms of its cost and its necessity to many consumers. New York's used-car lemon law has thus properly recognized that a professional seller should be required to fulfill a consumer's minimum reasonable expectation with respect to used automobiles.

This Comment will first review the remedies that were available to disappointed used-car buyers in New York State before the enactment of the used-car lemon law, including an examination of the resulting climate from which the law arose. Second, this Comment will examine the law itself—its provisions and their purposes. Finally, this Comment will address the effects of the law, the burdens and benefits it creates for both dealers and consumers, and the criticisms that have been leveled against it.

II. Consumer Protection Prior to Section 198-B

A. Used-Car Buyers Protection in New York Before Section 198-b

Before the used-car lemon law was enacted, buyers of used-cars in New York had three statutes under which they could seek relief: the Uniform Commercial Code (U.C.C.) as adopted in New York State,\(^{13}\) the federal Magnuson-Moss Warranty Act,\(^{14}\) and New York Vehicle and Traffic Law section 417.\(^{15}\) Though recovery was possible, frustrated consumers often encountered major obstacles to the enforcement of their rights under these laws. Though the laws are still in force, the lemon laws have essentially replaced them in the automobile context.

1. Uniform Commercial Code Remedies. The Uniform Commercial Code provides two remedies to new- or used-car buyers who are saddled with lemons: suit for breach of warranty and revocation of acceptance.\(^{16}\) These remedies are usually incorporated

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\(^{15}\) N.Y. VEH. & TRAF. LAW § 417 (McKinney 1986).

\(^{16}\) U.C.C. §§ 2-313 to -316 (1977) (breach of warranty); U.C.C. § 2-608 (1977) (revocation of acceptance).

A third remedy available to a used-car buyer under the U.C.C. is rejection. Under U.C.C. § 2-601, "if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may . . . reject the whole." Under U.C.C. 2-602(1), however, "[r]ejection of goods must be within a reasonable time after the delivery or tender. It is
into state lemon laws. However, while the U.C.C. is designed to cover sales generally, state lemon laws tailor these remedies specifically to the problems of automobile buyers. These laws also often provide for discretionary attorneys' fees, essential to most consumers.

a. Breach of Warranty Action Under the U.C.C. The U.C.C. action for breach of warranty covers both express warranties ineffective unless the buyer seasonably notifies the seller." Furthermore, under U.C.C. § 2-602(2)(a), "after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller." So the buyer essentially may not drive the car after rejection has allegedly taken place. Without either a refund of the purchase price in order to buy or rent another car, or use of the car during litigation, many buyers may be completely without transportation. The problem with the rejection remedy, then, is that "[t]he requisite element which the buyer must prove in order to enforce the remedy of rejection is that he has not made an effective acceptance of the automobile." Note, "Lemon Laws" in Ohio Turn Sour for the Dealer, 13 CAP. U.L. REV. 609, 614 (1984). Thus, this remedy is useless to all but a few purchasers because "in most cases, the nonconformity of the automobile does not become apparent to the buyer until well after the acceptance has been made." Id.

17. The U.C.C. was written by the American Law Institute and National Conference of Commissioners on Uniform State Laws in order to make uniform the law pertaining to certain commercial transactions. Sales transactions are governed by Article 2 of the U.C.C., which "applies to transactions in goods," U.C.C. § 2-102, while "goods" is defined broadly as "all things (including specifically 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." Id. § 2-105(1). The unborn young of animals, growing crops, and certain things to be severed from realty are also included in the definition of goods. Id. §§ 2-105, 2-107.

18. See infra notes 90-95 and accompanying text.

19. In revocation of acceptance cases, "legal fees often exceeded the money the buyer lost on the car. Dealers' and manufacturers' lawyers were well aware of this financial handicap when negotiating with the car buyer." Billings, Automobile Warranty Law: The Quiet Revolution, 90 CASE & COM. 3, 4 (Jan.-Feb. 1985).

20. Express warranties are covered by U.C.C. § 2-313, which provides:

(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 description.

(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 commen-
and implied warranties. There are two kinds of implied warranties: an implied warranty of merchantability\textsuperscript{21} and an implied warranty of fitness for a particular purpose.\textsuperscript{22}

The main weakness of express warranties lies in the limited usefulness of their remedies to consumers.\textsuperscript{23} Most used-car dealers did offer some form of express warranty to consumers before the
used-car lemon law was enacted. The most common warranty offered was a "fifty/fifty split," which provided coverage of all parts for thirty days, with the consumer and dealer splitting the cost of repairs. According to the State Attorney General's office, the fault of these warranties was that they provided "illusory protection" because "[t]here exists no readily available standard for calculating the actual costs for parts and labor that consumers must assume under such warranties. Repairs under split warranties are invariably inflated by dealers to the point where the consumer ends up paying for the total cost of repairs." Thus, split warranties are largely ineffective as a means to protect the used-car consumer.

Consumer use of implied warranties of merchantability and implied warranties of fitness for a particular purpose is limited because these warranties are usually disclaimed by express warranties. This can be done simply by the conspicuous use of the term "as is" in a written express warranty.

b. Revocation of Acceptance Under the U.C.C. The consumer faces formidable burden of proof obstacles in an action for revocation of acceptance under U.C.C. section 2-608. The statute re-


25. In order to lure first-time buyers and to increase the resale value of older models, Jaguar and BMW have recently joined Rolls-Royce in offering used-car warranties on their imports. Jaguar and BMW offer 12 month, 12,000 mile warranties on used cars that have been reconditioned by the dealers. Dealers acquire the cars through trade-ins or from other dealers, then examine and repair those selected for resale. N.Y. Times, Aug. 9, 1986, § 1, at 29, col. 3.

Although used-car warranties have been available to buyers through insurance companies, and Rolls-Royce stands behind its used cars, the new Jaguar and BMW warranty plans are the first factory-backed programs available to large numbers of buyers. The BMW plan covers selected cars with up to 75,000 miles dating back to the 1981 model year, while Jaguar's plan covers cars dating to the 1982 model year with up to 50,000 miles. Id. These new warranty programs provide a protection plan for used-car buyers similar to manufacturers' express warranties on new cars. It remains to be seen, however, whether similar programs will be adopted by American manufacturers selling traditional American models.

26. U.C.C. §§ 2-316(2), 2-316(3)(a) (1977). In addition, "when the buyer before entering into the contract has examined the goods . . . as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him." Id. § 2-316(3)(b).

Though these disclaimers must also meet U.C.C. requirements so that consumers are protected against unconscionable disclaimers, the test for unconscionability under U.C.C. § 2-302 requires proof of deviation from the standards of the industry, something which, unfortunately, is usually not present in a disclaimer case.

27. Section 2-608 provides:
quires: 1) "substantial impairment" of value to the consumer; 2) either acceptance on the reasonable assumption that the nonconformity would be cured and it has not been, or acceptance without discovery of a defect if the acceptance was reasonably induced by the difficulty of discovery or by the dealer's conduct in inducing the acceptance; 3) notice to seller before revocation; 4) revocation within a reasonable time after the discovery of the nonconformity and 5) no use after revocation (a requirement which can be extremely burdensome to car owners). Each of these requirements has been the subject of much litigation because each imposes such a heavy burden of proof and because the failure to prove a single element can be fatal to a buyer's claim.

2. The Magnuson-Moss Warranty Act. The Magnuson-Moss Warranty Act, enacted in 1975, was intended to give consumers added protection with respect to consumer warranties by providing a federal remedy. The Act provides that a warrantor may not limit the duration of an implied warranty, and requires that limitations or exclusions of consequential damages for breach of warranty appear conspicuously on the face of the warranty. The Act further requires refund or replacement without charge to the

(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.


28. See Note, supra note 23, at 408-09; Note, supra note 16, at 619-21. Even where use after revocation has been allowed, an amount corresponding to the "fair and reasonable use value" of the car can be deducted from the buyer's recovery.

29. See Note, supra note 7, at 1139. Revocation of acceptance, though burdensome, does have the advantage of allowing the buyer to recover both the purchase price and incidental and consequential damages. This is mitigated, however, by the use offset which, with regard to defective goods, leaves the seller with the use of the buyer's money while the buyer, in effect, did not have the use of a car.


31. Id. § 2304.
consumer, after a reasonable number of attempts have been made by a warrantor to remedy defects. In addition, the Act imposes limits on disclaimers or modifications of implied warranties and adds a conscionability requirement to limitations on the duration of implied warranties.

The most important provisions of the Act, however, are those involving remedies. First, unlike the U.C.C., the Magnuson-Moss Warranty Act provides for the award of attorneys' fees to a prevailing consumer. This reflects an important recognition of the burden a consumer faces under the U.C.C. where outcomes of litigation are difficult to predict. Second, the Act articulates a policy encouraging the use of informal dispute settlement mechanisms and provides for rules governing them.

The Magnuson-Moss Warranty Act is primarily a disclosure statute. Through it, "Congress sought to provide consumers with an adequate means of seeking redress against suppliers who use written warranties to induce sales, but then fail to fulfill their terms." However, the Act has been sharply criticized as inadequate in the automobile warranty context. It refers only to full warranties, and American Motors Corporation is the only car manufacturer to offer such a warranty. In fact, most automobile manufacturers now "offer limited warranties which vary from the traditional standard warranty only insofar as they must to comply with the Act's disclosure requirements and limitations on disclaim-

32. Id.
33. Id. § 2308(a).
34. Id. § 2308(b).
35. Id. § 2310(d)(2).
36. Note, supra note 16, at 634; see also supra note 19 and accompanying text.
37. 15 U.S.C. § 2310(a) (1982). One commentator has noted, however, that informal dispute resolution mechanisms can seriously disadvantage a consumer.

Dispute mechanisms undoubtedly do prevent litigation; but they do so in an undesirable way—by interposing costly and time-consuming steps before the consumer can obtain relief. Commentators have observed that providing meaningless steps for consumers often results in 'cooling out' [sic] the disputant. Whether manufacturers intend this result or not, they obviously benefit from procedures which encourage a consumer to 'lump it' or give up.

38. Note, supra note 7, at 1146.
40. See supra note 23.
ers of implied warranties." In short, "Congress . . . did not include adequate remedies for consumers seeking a refund for a defective product covered by a limited warranty." Instead, it took a disclosure approach, attempting to ensure that consumers would at least be aware that they were getting only a limited warranty. Limited warranties typically restrict remedies to the repair or replacement of parts, not to the repair or replacement of the auto itself. Limited warranties also restrict available damages and are by far the most common type of auto warranty for new cars.

3. New York Vehicle and Traffic Law Section 417. Added protection for New York State used-car buyers is seemingly afforded by section 417 of the New York Vehicle and Traffic Law, which was hailed by the State Attorney General's office as the most important of the buyer's legal remedies existing at the time of the used-car lemon law's enactment. This law, unlike the U.C.C. and the Magnuson-Moss Warranty Act, refers specifically to sales of secondhand motor vehicles. It requires that a retail dealer of secondhand motor vehicles deliver to the purchaser a certification that the vehicle sold complies with the Vehicle and Traffic Law and "that it is in condition and repair to render, under normal use, satisfactory and adequate service upon the public highway at the time of delivery." This law creates a statutory 'warranty of serviceability' that goes beyond the implied warranties [of merchantability and fitness for a particular purpose] of the Uniform Commercial Code. It is a statutory warranty that cannot be waived. The law does not specifically provide a cause of action to individual consumers. Rather, it simply states that:

41. Note, supra note 7, at 1143 (footnotes omitted).
42. Id. at 1146-47.
43. See supra note 23 and accompanying text.
44. Note, supra note 23, at 412.
46. N.Y. VEH. & TRAF. LAW § 417 (McKinney 1986).
47. See P. BIENSTOCK & S. MINDELL, supra note 2.
The failure of the vendor to deliver to the vendee the certificate required by this section or delivery of a false certificate knowing the same to be false or misleading or without making an appropriate inspection to determine whether the contents of such certificate are true shall constitute a violation of this section.  

Although the Commissioner of the New York State Department of Motor Vehicles has taken action against dealers who violate this section, it appears that this statute also served to permit private consumer actions before the New York used-car lemon law became effective. In fact, it was noted in one case that the required certification originally referred only to equipment such as lights, brakes, and signals. When the provision was made more general, it "was not only a matter of protection to the consumer, but also a matter of highway safety. A vehicle that stalls on a highway is a safety hazard as much as an automobile without proper lights and brakes." The law has been applied to allow individuals to rescind the installment sales contract, recover the purchase price of the vehicle, and recover expenses for repairs in addition to the purchase price. In one case, the court's analysis closely paralleled the language of the new lemon law, although the consumer here may have actually recovered more than he would have

53. See Rayhn v. Martin Nemer Volkswagen Corp., 77 A.D.2d 394, 434 N.Y.S.2d 775 (3d Dept. 1980) (purchasers entitled to rescind installment sales contract where automobile had such defects in safety equipment as to establish dealer's failure to meet required inspection to determine whether automobile was in condition to meet warranty of serviceability).
54. See Pirelli v. De Paula Chevrolet, Inc., 101 A.D.2d 643, 475 N.Y.S.2d 551 (3d Dept. 1984) (because car dealer did not make appropriate inspection and did not provide certification to buyer according to this section, buyer, upon surrender of car, was entitled to complete refund of purchase price where buyer provided an affidavit from a mechanic who examined car and concluded that it needed a new frame and was defective when buyer took delivery).
55. See Natale v. Martin Volkswagen, Inc., 92 Misc. 2d 1046, 402 N.Y.S.2d 156 (Utica City Ct. 1978) (where secondhand motor vehicle broke down almost as soon as it was put on the road and required numerous repairs soon thereafter, seller had breached warranty of serviceability and buyer was entitled to return of purchase price plus expenses for repairs).
under section 198-b. In *Natale v. Martin Volkswagen, Inc.*, the court found a breach of the warranty of serviceability under section 417 and a breach of the implied warranty of merchantability under the Uniform Commercial Code. In making its determination that the plaintiff was entitled to a refund of the purchase price plus repair expenses, the court did not specify which law it relied on. The court simply compared the warranties to the facts proven and came to its conclusion. Ironically, the plaintiff would not have done as well under the used-car lemon law because the vehicle cost only $400, far less than the $1,500 minimum now required for protection by the lemon law.

Section 417 has also been used to allow buyers to recover for personal injury and property damage. *Maure v. Fordham Motor Sales, Inc.* involved a manufacturing defect which caused the steering mechanism of the car to lock. The mechanism locked as the plaintiff was operating the vehicle, causing a collision which resulted in extensive damage to the vehicle. The Civil Court of the City of New York found that the defendant had violated section 417 of the Vehicle and Traffic Law, setting forth the issue with respect to remedy as: “where a defect is traceable to the manufacturer of an automobile later sold as a used car, should liability attach to the used car dealer who did not create the defect but did place the defective automobile in the stream of commerce.” Citing the legislative “policy of this State to protect purchasers of used vehicles from being sold defective vehicles,” the court found that the defendant’s violation “imposes liability on that defendant for the damages sustained by plaintiff as a result of the accident.” The policy cited by the court is the policy

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56. Id.
57. Pierce v. International Harvester Co., 61 A.D.2d 255, 402 N.Y.S.2d 674 (4th Dept. 1978) (if failure of seller to certify vehicle as required by section 417 was proximate cause of buyer’s injuries which occurred when vehicle’s brakes failed, buyer was entitled to recover damages from seller regardless of buyer’s contributory negligence).
59. Id.
60. Id. at 983, 414 N.Y.S.2d at 884.
61. Id. at 984, 414 N.Y.S.2d at 885. The court quotes a law review article to explain the rationale for its application of strict statutory liability to a used-car dealer:

Because of the realistic capabilities of an ongoing business enterprise, the wholesaler or retailer is deemed capable of controlling the condition of the product either directly or indirectly through pressure upon the manufacturer.
expressed, now more specifically, by New York General Business Law section 198-b.\textsuperscript{62}

As the above cases demonstrate, the main problem with section 417 is its vagueness. It does not clearly set forth consumers' rights and remedies but merely expresses public policy, which is often applied inconsistently by the courts. As State Attorney General Robert Abrams has stated, "the precise reach of the statute's general standard is uncertain, and can only be developed by a case-by-case basis."\textsuperscript{63} The used-car lemon law has been described as merely "supplement[ing]" section 417.\textsuperscript{64} In reality, it clarifies the law by specifying how the legislative policy expressed in Vehicle and Traffic Law section 417 can be practically applied. By making specific the rights and duties of all parties, the new law helps both dealers and consumers. Vehicle and Traffic Law section 417 is still effective, however, and can be applied to grant relief to a consumer not protected by the lemon law.

B. Developments Leading to the Enactment of Section 198-b

1. Used Motor Vehicle Trade Regulation Rule. The United States House of Representatives was the first to consider an automobile lemon law,\textsuperscript{65} in the form of a bill to extend Magnuson-Moss protection through remedies for breach of full warranty applicable to all new automobile warranties. The bill died in committee.\textsuperscript{66}

In 1982, the proposed Federal Trade Commission Used Car Rule was vetoed by Congress.\textsuperscript{67} This rule would have required used-car dealers to provide a written list of major defects of which the dealer was aware in a car offered for sale.\textsuperscript{68} The rule was

\textit{The used car dealer's role in controlling the condition of the used car, and profiting from its distribution justifies the imposition of initial loss upon him. Through the distribution of these used cars, the dealer perpetuates the risk of injury from a defective motor vehicle.}

\textit{Id. at 984, 414 N.Y.S.2d at 885 (quoting Note, 25 De Paul L. Rev. 574, 577 (1976)).}

62. Governor's Memorandum on Approval of Ch. 645, supra note 1.

63. Memorandum of Robert Abrams, supra note 24, at 7.

64. \textit{Id.} at 6.


66. \textit{Id.}


68. Comment, supra note 67, at 399.
designed to address several problems consumers face with respect to used cars. These include: the negation of implied warranty and contractual remedies through the use of "as is" sales, the risk involved for most buyers in "as is" sales because of their lack of mechanical expertise, and the general inadequacy of consumer information with regard to used vehicles.

In a second effort to address these problems, the Federal Trade Commission (FTC) promulgated the Used Motor Vehicle Trade Regulation Rule in 1984. Though its purpose is similar to that of New York General Business Law section 198-b, this rule takes an entirely different approach. The rule states that it was enacted "in order to prevent the unfair and deceptive acts or practices defined in paragraphs (a) and (b)." These include misrepresentation of the mechanical condition or warranty coverage of a used vehicle and the nondisclosure of the terms of the warranty on such a vehicle.

69. Id. at 400. See supra note 26 and accompanying text.
70. Comment, supra note 67, at 407.
Buyers usually possess little or no expertise regarding the modern automobile's complex machinery. They usually do not discover hidden defects until post-purchase problems arise. Although buyers will cursorily check under the hood and take short test drives, these "inspections" are almost meaningless considering the purchaser's lack of expertise and the salesman's distractions and reassurances. Used car buyers, as a group, indicate mechanical condition is their main purchasing consideration. Yet most buyers make purchasing decisions without adequate mechanical information. Dealers universally invest considerable money in cosmetic work or "detailing" to hide or distract the purchaser's attention from the actual mechanical condition.

71. Id. (footnotes omitted).
73. Under the Rule:
(a) It is a deceptive act or practice for any used vehicle dealer, when that dealer sells or offers for sale a used vehicle in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act: (1) To misrepresent the mechanical condition of a used vehicle; (2) To misrepresent the terms of any warranty offered in connection with the sale of a used vehicle; and (3) To represent that a used vehicle is sold with a warranty when the vehicle is sold without any warranty.
(b) It is an unfair act or practice for any used vehicle dealer, when that dealer sells or offers for sale a used vehicle in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act: (1) To fail to disclose, prior to sale, that a used vehicle is sold without any warranty; and (2) To fail to make available, prior to sale, the terms of any written warranty offered in connection with the sale of a used vehicle.
16 C.F.R. § 455.1(a) and (b) (1985).
This rule does not prohibit “as is” sales; it merely requires clear disclosure of the final terms of such a sale. The rule provides that the terms of a written warranty or of an “as is” sale with no warranty must be disclosed prior to the sale through the use of a window display form.\textsuperscript{74} This form is then incorporated into the contract of sale, serving to override any contrary provision in that contract.\textsuperscript{75} In short, this rule requires specific disclosure in an effort to promote informed consumer consent to sales contract terms.

The difference between the FTC rule and the remedial approaches taken in state lemon laws lies in their means of enforcement and their respective assumptions about the desires and abilities of consumers.\textsuperscript{76} The federal rule, rather than providing specific minimum warranty coverage, allows the seller and buyer to bargain over the warranty. Under the rule, the consumer can choose whether to buy “as is” and assume the risk of defect, or to buy with an extensive warranty and assume the added cost. Thus, the knowledgeable car buyer, who has confidence that his own inspection has proved sufficient, need not also pay for the dealer’s inspection costs.

\begin{itemize}
  \item \textsuperscript{74} 16 C.F.R. § 455.2 (1985).
  \item \textsuperscript{75} 16 C.F.R. § 455.3(6) (1985).
  \item \textsuperscript{76} According to one commentator, the FTC approach also reflects the Commission’s own limits: “The FTC, understandably was reluctant to become involved in trying to deal with individual car warranty disputes . . . in part because of concern that this would be perceived by the public as putting the FTC in the position of promising to solve individual problems.” It was hoped that mandatory disclosure of warranty coverage would channel competitive dealers into increased use of “full” warranties. Givens, Practice Commentary, N.Y. GEN. BUS. LAW § 198-a (McKinney Supp. 1987).
  \item The FTC Act, and the rules enacted pursuant to it, can be enforced only by the FTC. Private actions may not be brought under its provisions. See Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973). The force of the FTC Act is further limited by administrative procedures and the magnitude of its responsibilities.
    \begin{itemize}
      \item Traditionally public agencies charged with enforcing consumer protection laws have had to rely on administrative cease-and-desist proceedings, which in the case of the Federal Trade Commission have proved exceedingly cumbersome and time consuming. This technique is most frustrating because orders—either directed by the Commission or taken by consent—are prospective only. They do not undo whatever evil the unlawful practice has already caused.
      \item In addition, of course, the cease-and-desist remedy requires a case-by-case adjudication for each alleged violator.
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J. Spanogle & R. Rohner, Consumer Law 564 (1979). The provisions of the rule, then, may result in greater disclosure to consumers, but it gives them little in the way of compensation for economic losses suffered due to its violation.
Although the rule gives consumers more freedom of choice by leaving the regulation of auto sales to the marketplace, it carries the risk of leaving some consumers at a disadvantage. The rule provides no protection for the consumer who has little mechanical knowledge, and who would thus be best served by a full warranty, but who must forego one because he cannot afford the added costs of such a warranty. As a result, this law would not help those with low incomes who are most likely to rely on used rather than new cars for their transportation. Because these people effectively have no choice with respect to the degree of warranty protection they can negotiate, they gain little from the FTC rule.

The essence of the federal rule is the rights disclosure requirement. The rule specifically provides that the window form include the language: "Ask the dealer to put all promises in writing. Keep this form"; "Pre-Purchase Inspection: Ask the Dealer if you may have this vehicle inspected by your mechanic on or off the lot"; "Under state law, 'implied warranties' may give you even more rights [than those provided in dealer's warranty]" and "See the back of this form for important additional information, including a list of some major defects that may occur in used vehicles." Thus, this rule provides for consumer protection by requiring the dealer to inform consumers of their rights. The rule leaves the dealer free to promise only what he can deliver and it provides for enforcement of that promise. Though the disclosure does not increase consumers' substantive rights with respect to used cars, it does increase their awareness of the rights they do have.

Implicit in the FTC rule is a concern for the principles of Federalism and the traditional state regulation of auto sales. The rule does not apply in states that afford and enforce protection to used-car buyers that is as great or greater than that provided under the rule. Furthermore, state laws that limit or prohibit

77. See Note, supra note 67, at 405 n.51.
78. 16 C.F.R. § 455.2 (1985) and accompanying window form.
79. 16 C.F.R. § 455.6 (1985). Since it is unclear whether section 198-b meets this test, many Western New York car dealers have been giving the required lemon-law warranty in the federal window-sticker form. This enables consumers to examine the extent of warranty protection while still considering the purchase, makes them more aware that they have specific rights under the law, and protects the dealers as well.
"as is" sales of used cars (such as New York General Business Law section 198-b) preempt that portion of the rule permitting and regulating these types of sales.80

This rule attempted to address two major consumer abuses of used-car retailing—"dealer misrepresentation and non-disclosure regarding the dealer's post-sale warranty responsibilities, and mechanical condition at time of sale."81 By focusing on requiring specific information to be provided to consumers, the rule protects against fraudulent dealing while preserving marketplace regulation of risk and cost distribution.

2. New-Car Lemon Laws. In 1982, Connecticut became the first state to pass a new-car lemon law.82 This "Act Concerning Automobile Warranties" provides that, if a new motor vehicle does not conform to all applicable express warranties, the manufacturer, its agent, or its authorized dealer is required to conform the vehicle to the warranty, despite the fact that the warranty may expire before repairs are completed.83 A reasonable number of attempts to repair the vehicle shall be presumed only if a defect which substantially impairs the use, safety, or value of the vehicle to the consumer cannot be repaired after four attempts by the manufacturer, its agents, or authorized dealers during the warranty period, or if the vehicle is out of service due to these repairs for a total of thirty days during that period.84 If use is still substantially impaired after the attempted repairs, the law requires the manufacturer to replace the vehicle or refund the purchase price.85 If the manufacturer has established an informal dispute-settlement procedure which is certified by the attorney general as complying with certain applicable laws, the manufacturer is not obligated to provide refund or replacement of the vehicle unless the consumer has first resorted to this procedure.86 The act also

81. Comment, supra note 67, at 401 (footnotes omitted).
84. Id. § 42-179(d), (e).
85. Id. § 42-179(d).
86. Id. § 42-179(f). The procedure must comply with 16 C.F.R. Part 703 (1984), see infra notes 182-84 and accompanying text, and with CONN. GEN. STAT. ANN. § 42-182(b). The Connecticut statute provides additional criteria for a dispute-settlement procedure, focusing primarily on maximum periods for delay of decision or of performance of remedies.
provides that all other remedies at law are preserved. 87

As of the date of this Comment, forty-one states, including New York, 88 have passed new-car lemon laws. 89 One author has compared some of these laws and has found that there are several elements common to all:

First, they extend the manufacturer's repair obligations beyond the time limit set by the warranty if repairs during the warranty period fail to conform an automobile to the terms of the warranty. Second, they give automobile purchasers the remedies of refund or replacement of a defective automobile when a reasonable number of attempts at repair have failed. Third, they specify what constitutes a presumptively reasonable number of attempts to repair. Fourth, they allow consumers to recover directly against the manufacturer. Fifth, they apply only if the manufacturer offers an express warranty. Finally, they state that their remedies are nonexclusive. 90


Representative Woodcock of the Connecticut General Assembly, a strong advocate of lemon laws and the sponsor of the Connecticut bill, has hailed these laws as "necessary to increase the strength of buyers, improve communication between the manufacturer and the purchaser, and encourage dealers to handle warranty problems more efficiently." In the Connecticut House Debates, the rationale of the bill was described as a means to improve the responsiveness and accountability of manufacturers to consumer complaints. This legislative determination of who should bear the burdens and costs of defective new automobiles represents a weighing of presumed culpability and the ability to bear costs, as well as a recognition of the grave disparity in bargaining power between manufacturers and consumers. The laws are also a "legislative judgment that a consumer's interest in a dependable automobile backed by an enforceable warranty is too important to relegate to the 'intricacies of the law of sales.'"

Defective automobiles have been a source of aggravation to many consumers. Federal Trade Commission Chairman Michael Pertschuk has cited FTC surveys indicating that almost 30% of motor vehicles purchased in the United States are covered by warranty—compared to 7% warranted consumer goods overall. Of the vehicles protected by warranty, about 30% of the warranty-covered problems took over a month to resolve—compared to 14% for other products. As many consumers know from experience, automobile warranty service is often slow and inadequate. Automobile quality level has reached such a low that over 35 mil-


There are at least two reasons for allowing individual consumers to enforce [consumer protection] legislation. One is to overcome the possibilities of industry domination of the agency, or agency inertia, red tape or conservatism. The other is to place the consumer's ability to defend himself in his own hands where the abuse is important to him economically, but the agency is spending its resources on more important problems.

J. SPANOGLE & R. ROHNER, supra note 76, at 582.

92. *Cited in Note, supra note 7, at 1148 n.121*.


95. Id.

96. *See Honigman, supra note 90, at 117*. 
lion motor vehicles were recalled between 1977 and 1980. Consumer difficulty with warranty service is compounded by the fact that manufacturers and dealers often become embroiled in disputes over who should bear the burden of the service. These disputes take valuable time and often catch the buyer in the middle, unable to get relief until it is determined who is to provide it. In enacting lemon laws, state legislatures have sought to counter reluctance on the part of manufacturers and dealers to perform warranty service on new automobiles by providing clearer guidelines.

These state lemon laws are a continuation of the consumer protection trend that began in the 1970s. They focus not on the warranties provided but on their actual application. Moreover, in attempting to protect aggrieved new-car buyers, these laws enunciate important policies. They lay a foundation for New York's extension of the same principles of fairness and the equalization of bargaining power to cover used-car purchases.

C. New York General Business Law Section 198-a

Section 198-a of the New York General Business Law is a lemon law relating to new cars, which served as the model for New York's used-car lemon law. The law provides remedies for a consumer whose new motor vehicle does not conform to all applicable express warranties during the first 18,000 miles or two years of operation. It provides for the award of attorney's fees to a prevailing plaintiff and terms void as against public policy any agreement to limit, waive, or disclaim a consumer's rights under the law. This law, however, provides protection to very few used-car buyers. It extends only to a person to whom the vehicle is transferred during the "duration of the express warranty applicable to such motor vehicle"—a period often much shorter than two years. Those new-car buyers who are provided with express warranties lasting longer than two years must resort to action for breach of contract or other remedies to enforce their rights under the warranty after the first 2 years or 18,000 miles.
than the resale life of a vehicle.

III. NEW YORK GENERAL BUSINESS LAW SECTION 198-B—NEW YORK'S USED-CAR LEMON LAW

A. Reasons for the Law

In a recent article, one commentator predicted that [lemon law] relief for used-car buyers probably would not be enacted because "it is a commonly held opinion that used car buyers accept the risk of bad cars so it is not fair to expect sellers to guarantee the quality of used goods." Spurred by increased protection for new-car buyers and in recognition of the contrastingly harsh consumer realities faced by unprotected used-car buyers, however, the New York State legislature recently extended specific legal protection to used-car buyers.

Two specific developments set the stage for the passage of New York's used-car lemon law: the movement toward promulgation of the Federal Used Motor Vehicle Trade Regulation Rule and the enactment of new-car lemon laws by many states. The consumer protection orientation of the new-car lemon laws, together with the growing realization that existing protection of used-car buyers was inadequate, helped lead the New York State legislature to act to protect used-car buyers in this state.

The used-car lemon law is an implicit recognition that the disparity between protections for new- and used-car buyers does not adequately reflect the significance of the purchase to each group. Furthermore, the law recognizes that the problems faced by used-car buyers are often more serious than those faced by new-car buyers. In a Harris poll taken in 1977, "consumers ranked four industries as the worst in terms of serving consumers: garages and auto mechanics, car manufacturers, the oil industry, and used car dealers" and the problem continues. Consumer complaints reflect concerns with defects, which frequently become apparent

These consumers include purchasers of Rolls-Royce, Jaguar, and BMW automobiles. See supra note 25.

106. See supra notes 65-81 and accompanying text.
107. See supra notes 82-99 and accompanying text.
109. Defects are of two types, manufacturing and design. While design defects may
soon after purchase.

The New York City Department of Consumer Affairs analyzed the complaints it received in 1982 concerning used cars and found that 70% of those complaints involved mechanical defects. Their analysis revealed that 81.8% of the defects surfaced within the first thirty days (46.3% of the defects reported surfaced within the first week and 23.2% were evident on the first day).110

The State Attorney General's Bureau of Consumer Frauds and Protection finds that the sale of defective used cars continues to be a major problem for New York consumers. The complaint files of consumer agencies and of the state attorney general are "replete with instances of serious defects manifesting themselves almost immediately after the sale. Indeed, it is not unusual to find cases where mechanical defects appear even before the consumer can drive home."111 Moreover, the used-car market is a significant one. In the last ten years, "used cars have outsold new ones by an average of two to one."112 In fact, "[i]n 1982, it is estimated that New Yorkers bought close to one million used cars from used car dealers."113

The statute also represents a recognition of the inadequacy of the then-existing remedies: "The Attorney General has long sought to provide an effective remedy for used car buyers that is certain, expeditious and inexpensive, as a supplement to existing legal remedies which basically lack these critical attributes."114

The used-car lemon law has been hailed as "an important addition to the remedies available under the U.C.C. and the Vehicle

affect a greater number of cars of a given model and may make relief for the consumer easier through a recall, both kinds of defects can cause equally trying problems for the consumer.


111. Memorandum of Robert Abrams, supra note 24, at 5. See also Sale of Used Vehicles, Final Report to the F.T.C. and Proposed Trade Regulation Rule (1978), which provides ample evidence "that a substantial number of used cars are sold with significant defects." (cited in Memorandum of Robert Abrams, supra note 24, at 5).

In addition, a survey research firm, National Analysts, Inc., found that "one third of its used car buyer survey's 400 respondents reported defects in their used cars. In its survey, of those reporting defects more than half (53%) reported defects within the first two months after purchase while 35% reported defects within the first 30 days." (cited in id. at 6).

112. Memorandum of Robert Abrams, supra note 24, at 5.

113. Id.

114. Id. at 6.
and Traffic Law."\textsuperscript{118} The new law has several advantages over the U.C.C. It provides a statutory definition of "reasonable opportunity to correct a malfunction or defect," which contains a presumption shifting the burden of proof from the purchaser to the dealer, thus reducing the serious proof problems faced by consumers under the U.C.C.\textsuperscript{116} It also deems void as contrary to public policy any agreement to waive, limit, or disclaim a consumer's rights under the law.\textsuperscript{117} Finally, it provides for a discretionary award of attorney's fees to a prevailing plaintiff.\textsuperscript{118}

The law also has a major advantage over the New York Vehicle and Traffic Law. Consumers face serious recovery problems under section 417 of the Vehicle and Traffic Law "because the burden of proving the existence of a serious defect is on consumers who lack the expertise to make such a determination, while the burden of prosecuting is on the Department of Motor Vehicles, which obviously has substantial difficulty in making a consumer's case stick against a used car dealer."\textsuperscript{119} Though, according to the New York State Attorney General's office, this Vehicle and Traffic Law statutory warranty of serviceability has been liberally construed,\textsuperscript{120} "the precise reach of the statute's general standard is uncertain, and can only be developed on a case-by-case basis."\textsuperscript{121} The used-car lemon law provides a specific detailed warranty\textsuperscript{122} and a remedy designed to alleviate the problems faced by many used-car buyers.\textsuperscript{123}

According to the state attorney general, "[t]he new law should encourage improved quality control by used car dealers, a more responsive attitude toward consumer complaints and improved repair service by dealers or their agents. Prompt and fair settlement of cases involving defective used cars will also be encouraged."\textsuperscript{124} The law was designed to achieve these objectives.

\textsuperscript{115} Id. at 5.

\textsuperscript{116} N.Y. GEN. BUS. LAW § 198-b(c)(2) (McKinney Supp. 1987).

\textsuperscript{117} Id. § 198-a(d)(1).

\textsuperscript{118} Id. § 198-b(f)(4).

\textsuperscript{119} Memorandum of the New York State Automobile Association 1 July 17, 1984 (contained in the Governor's Bill Jacket for Ch. 645 of the Laws of 1984).

\textsuperscript{120} Id. at 7.

\textsuperscript{121} Id. See also supra notes 46-64 and accompanying text.

\textsuperscript{122} N.Y. GEN. BUS. LAW § 198-b(b) (McKinney Supp. 1987).

\textsuperscript{123} Id. § 198-b(c).

\textsuperscript{124} Memorandum of Robert Abrams, supra note 24, at 5.
B. Provisions of Section 198-b

1. Definitions. The first subsection of section 198-b provides definitions of "consumer,"125 "used motor vehicle,"126

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125. N.Y. GEN. BUS. LAW § 198-b(a)(1) (McKinney Supp. 1987). The law limits the definition of "consumer" to a "purchaser, other than for purposes of resale, of a used motor vehicle normally used for personal, family, or household purposes . . . ." Id. Though the definition also includes the "spouse or child" of a purchaser (if the vehicle is transferred to him or her during the duration of the warranty) and includes any other person entitled, through its terms, to enforce the obligations of the warranty, the definition may not be broad enough. The limitation to family "purposes" ignores the substantial impact that owning a lemon can have on small businesses that cannot afford to absorb great losses. See Note, supra note 23, at 426. A similar definition of consumer is set forth in the New York new-car lemon law and was applied in Barco Auto Leasing Corp. v. PSI Cosmetics, Inc., 125 Misc. 2d 68, 478 N.Y.S.2d 505 (N.Y.C. Civ. Ct. 1984). The court held that the law's coverage extends neither to corporate entities, regardless of size, nor to transactions effected for business purposes. Id. This exclusion of corporate entities from the protection of the lemon laws reflects common public misconceptions regarding the nature of most corporations, many of which are harmed just as much as individuals when they purchase "lemons." See generally, A. CONARD, CORPORATIONS IN PERSPECTIVE, Chapter 4, § 63 (1976).

126. N.Y. GEN. BUS. LAW § 198-b(a)(2) (McKinney Supp. 1987). The law restricts the definition of "used motor vehicle" to exclude "motorcycles, motor homes and off-road vehicles." The vehicle must also have been driven for purposes other than just moving or road-testing it for the law to apply. Id. This provision keeps separate the realms of section 198-a (the new-car lemon law) and section 198-b (the used-car lemon law). Even if a car meets this definition, however, it may be excluded from statutory coverage. Under subparagraph (d)(3), the statute does not apply to classic cars, to cars sold for less than $1,500, or to cars with more than 100,000 miles on them if this mileage is indicated in writing at the time of sale. Id. § 198-b(d)(3).

The word "classic" in the statutory exception is undefined. Although the courts could interpret this provision, the term "historical" is already in use in existent law. Section 401 of the Vehicle and Traffic Law defines a "historical motor vehicle" as "any vehicle manufactured more than twenty-five years prior to the current calendar year, and any other model, year and type vehicle which has unique characteristics and which is determined by the commissioner to be of historical, classic or exhibition value." N.Y. VEH. & TRAF. LAW § 401 (McKinney 1986). To prevent two parallel but inconsistent sets of definitions and interpretations, the word "classic" in section 198-b should be changed to the word "historical."

Although buyers of used cars costing $1500 or less are not afforded protection by the used-car lemon law, "cause[s] of action for money only not in excess of one thousand five hundred dollars exclusive of interests and costs" are defined as small claims providing the consumer with a realistic avenue of pursuing his claim—small claims court. N.Y. UNIFORM DIST. CT. ACT § 1801 (McKinney 1963 & Supp. 1987); N.Y. UNIFORM CITY CT. ACT § 1801 (McKinney 1963 & Supp. 1987); N.Y. CIV. CT. ACT § 1801 (McKinney 1963 & Supp. 1987); N.Y. UNIFORM JUST. CT. ACT § 1801 (McKinney 1963 & Supp. 1987). Small claims court is designed to give a realistic remedy where the amount in controversy is relatively small. Its "practice, procedure and forms shall differ from the practice, procedure and forms used in the court for other than small claims . . . . They shall constitute a simple, informal and inexpensive procedure for the prompt determination of such claims in accordance with the rules and principles of substantive law." N.Y. UNIFORM DIST. CT. ACT § 1802
"dealer," "warranty," "service contract," and "repair in-

The 100,000 miles exception was added by amendment in 1985. See supra note 3. "It was argued that the cost of covering such high-mileage cars was excessive, resulting in immediately high costs for consumer buyers, and excessively reduced trade-in allowances for consumers selling such vehicles." Memorandum of Assemblyman Ralph Goldstein 1 (July 12, 1985) (contained in the Governor's Bill Jacket for Ch. 794 of the Laws of 1985). According to State Attorney General Robert Abrams, the reasoning behind the amendment is that "vehicles with such extensive mileage are past their useful life to such a degree that a dealer's warranty obligation may be excused." Memorandum for the Governor by Attorney General Robert Abrams 2 (July 17, 1985) (contained in the Governor's Bill Jacket for Ch. 794 of the Laws of 1985). He noted, however, that such vehicles are still covered by the warranty of serviceability of the Vehicle and Traffic Law and any private extended service contract purchased by the consumer. Id. The State Consumer Protection Board expressed some concern that consumers paying over $1,500 for such a car could not expect it to meet the minimum lemon law standard for even 30 days. It suggested that purchasers of such excluded vehicles be carefully monitored to determine the effects of the amendment on them. Memorandum of Lizette A. Cantres, General Counsel State Consumer Protection Board (July 10, 1985) (contained in the Governor's Bill Jacket for Ch. 794 of the Laws of 1985).

Although this amendment requires the consumer to be given a written statement of the car's mileage before purchase, nothing in the law requires the consumer to be told that this mileage statement will result in an exclusion from used-car lemon law protection. The law should also require the dealer to notify the consumer of the resulting loss of protection.

The law was amended in 1985 to exclude the word "passenger" before "motor vehicle" in this definition. The letters in the Governor's Bill Jacket differ as to whether this is a change in meaning or a clarification. The letter of Assemblyman Ralph Goldstein, Chairman of the Committee on Consumer Affairs and Protection, states that "the amendment makes clear that they are in fact included." Memorandum of Assemblyman Ralph Goldstein, supra. The letter of Senator L. Paul Kehoe, on the other hand, states that the amendment "expands the protections of the Used Car Lemon Law to include light vans and trucks driven for personal, household or family use." Memorandum of Senator L. Paul Kehoe (July 16, 1985) (contained in the Governor's Bill Jacket for Ch. 794 of the Laws of 1985). Similarly, the Memorandum for the Governor by Attorney General Robert Abrams states that the amendment expands coverage "to bring used small vans, sports/utility four-wheel-drive wagons and light trucks within the ambit of the law." Memorandum for the Governor by Attorney General Robert Abrams, supra. Though it seems that light vans and trucks were not covered by the original law, it is now clear that they are included.

127. N.Y. Gen. Bus. Law § 198-b(a)(3) (McKinney Supp. 1987). The used-car lemon law defines a dealer as someone who sells or offers for sale four vehicles in twelve months. Id. This definition of "dealer" is inconsistent with the dealer registration provisions of the Vehicle and Traffic Law, which defines a dealer as "any person who sells, or offers for sale more than five motor vehicles . . . in any calendar year . . . ." N.Y. Veh. & Trac. Law § 415 (McKinney 1986) (emphasis added). Thus, an individual could be considered a dealer under the lemon law and yet not be required to obtain a dealer's registration under the Vehicle and Traffic Law. At the present time, a consumer can contact the New York Department of Motor Vehicles to ask whether a given seller is licensed as a dealer under the Vehicle and Traffic Law. Thus, if one is not licensed, it is still possible, as the law now
stands, for a car dealer to be considered a "dealer" under the lemon law even though there is no present way for a consumer to verify this fact. These two laws should be made internally consistent. It should be noted, however, that this may be nothing more than a theoretical point of interest. I suspect that it is unlikely that any consumer, however well-informed, would actually call to see whether a given agency is a registered dealer. Furthermore, under the lemon law, if the seller fits the statutory "dealer" definition, he is deemed to have given the required warranty whether he does or not. If a transaction progressed to the point where a consumer was asserting his rights against the seller in arbitration or in court, due consideration could then be given as to whether the seller fell within the statutory "dealer" definition.

The "dealer" definition also excludes certain agencies which, though selling vehicles occasionally, are clearly not intended to be held to the dealer standard. These include: a business selling to its employees, a lessor selling to a lessee, public utilities selling "as is" at auction, and the state. N.Y. GEN. BUS. LAW § 198-b(a)(3) (McKinney Supp. 1987). These exceptions seem premised on a policy of preventing the creation of an unjustified burden, and on the fact that, in the first two instances, the buyer is reasonably familiar with the condition of the vehicle before purchase, or at least with the conditions under which it has been driven and the use to which it has been put.

The public utilities exception was added by amendment in 1985. 1985 Laws of N.Y. 450 (codified as amended at N.Y. GEN. BUS. LAW § 198-b(a)(3) (McKinney Supp. 1987)). There are two major rationales for this exception. First, it would exempt entities which are not in the business of selling used cars. Second, the costs of offering any warranty on cars sold by a public utility would come out of the pockets of its ratepayers. In addition, Edward W. Livingston, Consolidated Edison's Vice President-Community and Government Relations has stated that "Con Edison's auctions of heavy equipment attract sophisticated buyers from around the nation. Clearly these buyers are not the ones the used car lemon law was designed to protect." Memorandum of Edward W. Livingston, Vice President-Community and Government Relations of Consolidated Edison Company of New York, Inc. 2 (June 27, 1985) (contained in the Governor's Bill Jacket for Ch. 450 of the Laws of 1985). Though this statement refers to heavy equipment, it seems reasonable that there would also be sophisticated buyers for the vehicles as well.

The application of this statute to dealers only, N.Y. GEN. BUS. LAW § 198-b(b) (McKinney Supp. 1987), is consistent with the general inexpertness and nonprofessional status of individuals and is likely motivated by concerns for "equity and efficiency." Note, Protecting the Buyer of Used Products: Is Strict Liability for Commercial Sellers Desirable?, 33 STAN. L. REV. 535, 539 (1981). The law may reach too far, however, according to the Car and Truck Renting and Leasing Association (CATRALA) in its memorandum in [conditioned] opposition to this bill. Memorandum of Donald J. Boyle on behalf of the Car and Truck Renting and Leasing Association (CATRALA) 1 (July 23, 1984) (contained in the Governor's Bill Jacket for Ch. 645 of the Laws of 1984). The Association states that because many rental agencies do not have the facilities to repair automobile problems, "this bill creates an entire new industry—the warranty industry" and that these restrictions will only result "in an increase in the price of the car to the consumer." Id. at 2. CATRALA's fears seem exaggerated, however, because though the warranty industry has indeed benefited a great deal from the law, the resultant price increases to the consumer have been minimal. Most used-car dealers who are associated with new-car dealerships have opted to purchase warranties on each car they sell. For example, one dealer associated with a new-car dealership in Western New York pays a warranty company $77 per car with a resultant price increase to the consumer of about $50 per car. These dealers are generally more selective than independent used-car dealers and sell self-proclaimed better quality, higher-priced cars. Independent dealers, in contrast, usually provide the warranty themselves and may vary the
estimated cost of providing it, depending on the condition of each individual vehicle, with corresponding price increases to the consumer. Interview with Jim Krentz, Sr., Used-Car Manager, Mernan Chevrolet, in Buffalo, N.Y. (March 11, 1986).

CATRALA also notes that “the definition [of dealer] is so far-reaching it is conceivable that it will inadvertently include many people who are not in the business of selling used cars and will have the same problems as [these agencies] in providing used cars with a warranty.” Memorandum of Donald J. Boyle, supra at 2. CATRALA seems to have missed the mark here, however. Under the statute, a person who sells more than four used cars in a year is deemed to be in the business of selling used cars and is held to a higher standard because of it. This definition necessarily involves some line-drawing, although it is true that the line might better be drawn in the place that the Vehicle and Traffic Law dealer registration provision has drawn it.

CATRALA also points out that those who are “dealers” under this law may not know it until a claim is brought against them. Memorandum of Donald J. Boyle, supra. If this were to happen, it could have adverse consequences for a “dealer” because of the “deemed” warranty. This notice problem could be solved, in part, by greater publicity about the law. Such publicity is crucial if both dealers and consumers are to be aware of their rights and responsibilities under the law. Although most dealers have probably been made aware of the law through the Department of Motor Vehicles or through membership in New York State Auto Dealers or other similar organizations, consumers may be aware of its existence but not its substantive provisions. Consumers should be given more information at the time of sale about the protection to which they are entitled so that they can keep sufficient records, give adequate notice of problems, and assert their rights in a timely fashion. See infra note 188.

128. N.Y. GEN. BUS. LAW § 198-b(a)(4) (McKinney Supp. 1987). The term “warranty” is defined broadly as “any” undertaking made in connection with the sale of the vehicle, but the law does not specify whether it applies to oral or written warranties or both. This omission was noted by the New York State Bar Association Committee on Business Law. Memorandum of Robert B. Frank, Chairman of the New York State Bar Association Committee on Business Law 1 July 12, 1984) (contained in the Governor’s Bill Jacket for Ch. 645 of the Laws of 1984). Because subsection (b) of the law requires the provision of a written warranty, the law should also specify either that the law applies to both oral and written representations or should incorporate into the written warranty a provision, such as that in the federal rule, informing consumers that they should have all promises by the dealer put in writing. The latter seems a better approach because of the enormous proof problems faced by a consumer attempting to enforce oral representations made by a dealer. In the absence of a specific provision, however, the law should be held to apply to both oral and written representations to protect a consumer’s reliance interest.


130. N.Y. GEN. BUS. LAW § 198-b(a)(6) (McKinney Supp. 1987). “Repair insurance” is defined broadly in the statute and includes “a contract in writing for any period of time or any specific mileage to refund, repair . . . or take other action with respect to a used motor vehicle.” Id. The State of New York Insurance Department has noted that this definition is overbroad, though unintentionally, because it “would literally apply to collision and comprehensive insurance coverage.” Memorandum of James P. Corcoran, Superintendent of Insurance, by Salvatore R. Curiale, First Deputy Superintendent 1 July 20, 1984) (contained in the Governor’s Bill Jacket for Ch. 645 of the Laws of 1984). Action is needed by the legislature to make this definition more specific or its intent clearer.
regarded because they implicitly contain some of the greatest limitations on the coverage of the statute when they are interpreted as part of its substantive provisions.

2. Parties' Rights and Duties at Time of Sale. Most of the dealer's obligations at the time of sale are outlined in subsection (b) of section 198-b. It requires that the dealer must give a written warranty that provides at least a minimum specified degree of coverage.

Subsection (b)(1) provides that "[n]o dealer shall sell a used motor vehicle to a consumer without giving the consumer a written warranty." Under subsection (d)(1), a dealer who fails to give the required warranty is nevertheless "deemed to have given such warranty as a matter of law." The dealer is also required to give the consumer a written notice explaining that, if a refund is to be given, the value of any vehicle traded-in by the consumer and not returned by the dealer will not be the contract price but may be calculated with reference to the vehicle's book value. This notice and the required warranty must be "delivered to the consumer at or before the time the consumer signs the sales contract for the used motor vehicle."

The written warranty given must apply at least until the earlier of thirty days or 1,000 miles if the vehicle has more than 36,000 miles at the time of sale, or until the earlier of sixty days

131. N.Y. GEN. BUS. LAW § 198-b(b) (McKinney Supp. 1987).
132. Id. § 198-b(b)(1).
133. Id. § 198-b(d)(1).
134. Id. § 198-b(c)(1). The actual text of the provision is as follows:

   The dealer selling the used motor vehicle shall deliver to the consumer a written notice including conspicuous language indicating that if the consumer should be entitled to a refund pursuant to this section, the value of any vehicle traded-in by the consumer, if the dealer elects to not return it to the consumer, for purposes of determining the amount of such refund will be determined by reference to the National Auto Dealers Association Used Car Guide wholesale value, or such other guide as may be approved by the commissioner of motor vehicles, as adjusted for mileage, improvements, and any major physical or mechanical defects, rather than the value listed in the sales contract.

Id.
135. N.Y. GEN. BUS. LAW § 198-b(e) (McKinney Supp. 1987). This subsection also provides that the warranty and the notice may be on one sheet or on separate sheets. "They may be separate from, attached to, or a part of the sales contract. If they are part of the sales contract, they shall be separated from the other contract provisions and each headed by a conspicuous title." See McKinney's Session Law News, Ch. 321, § 2 (August 1986) (codified as amended at N.Y. GEN. BUS. LAW § 198-b(e) (McKinney Supp. 1987)).
or 3,000 miles if the vehicle has 36,000 miles or less.\textsuperscript{137} These short mandatory warranty periods reflect both the realities of used-car purchases and traces of the caveat emptor doctrine. The warranty protects the buyer for a short period, but then he is on his own. The short periods probably also reflect a desire to free used-car dealers from long-term obligations.\textsuperscript{138} Though a dealer can ensure that a car is in good working order before sale, it is often hard to predict how long a used car will remain that way. These warranties are primarily designed to protect against blatant cases of dealer negligence or fraud, such as the case in which the car breaks down on the drive home from the dealership because the dealer has failed to discover its defects or has made cosmetic repairs to conceal them.\textsuperscript{138}

The statute can operate to shorten or extend the warranty period if certain conditions are met. Of course, the period can also be extended at the dealer's option. The required term may be shorter only if an adequate new-car warranty is still in effect with respect to a particular vehicle.\textsuperscript{140} Three provisions of the statute can automatically extend the length of coverage of the warranty. Subsection (b)(3) prevents the dealer from stalling past the end of the warranty period; it requires that repair or reimbursement be made regardless of the warranty's expiration so long as the consumer has notified the dealer of the failure of the covered part within the warranty period.\textsuperscript{141} In light of the legislative intent of the provision, it is logical to assume that merely bringing the car in for repairs would furnish the necessary notice.

\begin{itemize}
\item \textsuperscript{137} \textit{Id.} § 198-b(b)(1)(a).
\item \textsuperscript{138} One dealer, who chose to remain anonymous, stated that he no longer buys cars with less than 36,000 miles because he does not want to be obligated for sixty days on any used car.
\item \textsuperscript{139} \textit{See supra} notes 70, 109-10 and accompanying text.
\item \textsuperscript{140} N.Y. GEN. BUS. LAW § 198-b(b)(4) (McKinney Supp. 1987). Subsection (b)(4) allows for a section 198-a (new-car) warranty to override a section 198-b warranty on a used car to the extent that the former is valid. Thus, the section 198-b warranty is required only from the expiration of the section 198-a warranty until its own expiration under (b)(1). \textit{Id.} Section 198-a can provide greater protection by allowing the consumer to reach the manufacturer, but because the automobile is still a "used" car within the meaning of the statute, the consumer is given section 198-b protection when the expiration of the new car warranty makes it necessary.
\item \textsuperscript{141} \textit{Id.} § 198-b(b)(3). Consumers face potential proof problems here, however, and it is crucial that they record, for example, the date that they called for a repair appointment. Interview with Kathleen Weppner, Autocap Director, Niagara Frontier Auto Dealers Association, in Buffalo, N.Y. (March 12, 1986).
\end{itemize}
Similarly, subsection (c)(3) provides that the term of a warranty, service contract, or repair insurance shall be extended by the time period during which the vehicle is in the possession of the dealer or his agent.\textsuperscript{142} Once the dealer has held the car for over forty-five days for repair purposes, however, the consumer can avail himself of other remedies available under the law.\textsuperscript{143} In addition, subsection (c)(4) provides a similar extension of the warranty term for the time “during which repair services are not available to the consumer because of a war, invasion or strike, fire, flood or other natural disaster.”\textsuperscript{144} This prevents an unreasonable burden from falling on the dealer but it has been subject to the same criticisms as the other extensions.\textsuperscript{145}

The required written warranty “shall require the dealer or his agent to repair or, at the election of the dealer, reimburse the consumer for the reasonable cost of repairing the failure of a covered part.”\textsuperscript{146} The statute lists the minimum parts which must be covered; this list includes most essential parts of a car and provides maximum coverage of these parts.\textsuperscript{147} The comprehensive-

\textsuperscript{142} N.Y. GEN. BUS. LAW § 198-b(c)(3) (McKinney Supp. 1987). This provision, while preventing dealer stall techniques, has been sharply criticized. It places a high burden of vigilance and awareness on warranty and insurance agencies. The New York State Bar Association Committee on Business Law questions “the constitutionality of any provisions which would impair the terms of the insurance contract between the purchaser and the insurance company.” Memorandum of Robert B. Frank, supra note 128. The State of New York Insurance Department states that “[i]t would be unprecedented for an insurance contract with a specified term to be subject to such indefinite extension provisions.” Memorandum of James P. Corcoran, supra note 130, at 1. It further notes that “[i]nsurers would have to devise methods under which they would be kept apprised of the times when cars were in repair facilities in order to avoid subsequent spurious claims.” \textit{Id.} In addition, “[i]nsureds would have the burden of documenting the exact periods during which their cars were in repair facilities.” \textit{Id.} Furthermore, these extension provisions would have to be included in the insurance policy to make consumers aware of their rights. These constitutionality and fairness problems could probably be dealt with by extending only terms of warranties, service contracts, and repair insurance provided by the dealer. There is, however, a 45-day statutory limit on dealer possession for repair purposes. After that time has elapsed, the consumer has remedies under the lemon law. Because warranties and service contracts are provided by or through the dealer and the dealer keeps records of repairs, a possible 45-day extension of these seems a minimal burden. The insurance exemption, on the other hand, should be reexamined by the legislature.

\textsuperscript{143} N.Y. GEN. BUS. LAW § 198-b(c)(2)(b) (McKinney Supp. 1987).
\textsuperscript{144} N.Y. GEN. BUS. LAW § 198-b(c)(4) (McKinney Supp. 1987).
\textsuperscript{145} Memorandum of James P. Corcoran, supra note 130, at 1-2.
\textsuperscript{146} N.Y. GEN. BUS. LAW § 198-b(b)(2) (McKinney Supp. 1987).
\textsuperscript{147} See Memorandum of Robert Abrams, supra note 24. The list of covered parts required is as follows:
ness of this coverage has been criticized for putting "a considerable damper on competition within the used car marketplace since it is now nearly impossible for a dealer to provide a competitive edge by offering a better warranty than that mandated by law." This criticism seems exaggerated. Though dealers may not be able to include many additional parts in their warranties, they can extend the time periods of the warranties, lower their prices, provide towing or expense reimbursements, provide temporary replacement transportation, or provide reliable repair service in order to maintain a competitive edge.

Certain provisions in the statute allow the dealer to limit his liability to the failure of the automobile itself due to normal use. Subsection (b)(5) provides that the dealer may include additional language in the warranty excluding coverage in any of twelve listed instances. Most of these instances involve user abuses of the car, whether intentional or unintentional, including: failure due to lack of customary maintenance, collision, theft, vandalism, racing, and towing another vehicle (unless the manufacturer specifies that the vehicle is equipped to tow).

(a) Engine. All lubricated parts, water pump, fuel pump, manifolds, engine block, cylinder head, rotary engine housings and flywheel.
(b) Transmission. The transmission case, internal parts, and the torque converter.
(c) Drive axle. Front and rear drive axle housings and internal parts, axle shafts, propeller shafts and universal joints.
(d) Brakes. Master cylinder, vacuum assist booster, wheel cylinders, hydraulic lines and fittings and disc brake calipers.
(e) Radiator.
(f) Steering. The steering gear housing and all internal parts, power steering pump, valve body, piston and rack.
(g) Alternator, generator, starter, ignition system excluding the battery.


149. Every used-car dealer I spoke with had offered some form of warranty before the law. Most of these were "fifty/fifty split" warranties (the dealer and purchaser share the cost of certain repairs equally). Though a fifty/fifty warranty is not a strong form of protection for the consumer, dealers distinguished themselves through cooperation and negotiation, often despite warranty expirations.
151. Id. § 198-b(b)(5)(a).
152. Id. § 198-b(b)(5)(b).
153. Id.
154. Id.
155. Id. § 198-b(b)(5)(f).
156. Id. § 198-b(b)(5)(g).
can also be excluded for maintenance services not required for repair of a covered part,\textsuperscript{157} if the odometer has been stopped or altered so that mileage cannot be read,\textsuperscript{158} or if a covered part was altered and as a result failed.\textsuperscript{159} If the used motor vehicle is rented to someone else or used to carry passengers for hire, coverage may be excluded.\textsuperscript{160} The dealer may also exclude coverage for property damage arising from the failure of a covered part\textsuperscript{161} and, to the extent otherwise permitted by law, "for loss of the use of the used motor vehicle, loss of time, inconvenience, commercial loss or consequential damages."\textsuperscript{162} This limited liability reduces the risk to a dealer of having to repair or replace when the consumer is at fault. It also reduces the risk of the dealer having to account for property and consequential damage resulting from automobile failures, which, in turn, prevents the cost to the consumer from becoming unreasonably high. It is thus crucial that a dealer, in order to protect himself, remains aware of these various limitations on liability provided for in the statute.

3. Parties' Rights and Duties When a Problem Arises. Subsection (c) covers the consumer's rights and obligations in the event of a dealer's failure to fulfill his repair obligations. The law sets forth several conditions for recovery. The essential provision is as follows:

If the dealer or his agent fails to correct a malfunction or defect as required by the warranty specified in this section which substantially impairs the value of the used motor vehicle to the consumer after a reasonable period of time, the dealer shall accept return of the used motor vehicle from the consumer and refund to the consumer the full [adjusted] purchase price.\textsuperscript{163}

In other words, there must be a malfunction or defect which must substantially impair the value of the used motor vehicle, and the dealer or his agent must fail to correct the malfunction or defect as required by the warranty after a reasonable period of time.

Though the "reasonable period of time" to correct a defect is not defined in the statute, subsection (c)(2) provides that "it shall

\begin{itemize}
  \item \textsuperscript{157} Id. § 198-b(b)(5)(d).
  \item \textsuperscript{158} Id. § 198-b(b)(5)(c).
  \item \textsuperscript{159} Id.
  \item \textsuperscript{160} Id. § 198-b(b)(5)(h) & § 198-b(b)(5)(i).
  \item \textsuperscript{161} Id. § 198-b(b)(5)(k).
  \item \textsuperscript{162} Id. § 198-b(b)(5)(l).
  \item \textsuperscript{163} Id. § 198-b(c)(1).
\end{itemize}
be presumed that a dealer has had a *reasonable opportunity* to correct a malfunction or defect in a used motor vehicle if . . . "164 certain conditions are met. For the sake of clarity and consistency, the statute should have been drafted with the same phrase in both subsections because the intent of the statute indicates that they have the same meaning.

The requirements for the presumption of a reasonable opportunity to repair are that: (1) the "same malfunction or defect" continues to exist after being "subject to repair three or more times by the selling dealer or his agent within the warranty period";165 or (2) the vehicle is out of service by reason of repair, malfunction, or defect for a total of fifteen days during the warranty period, not including days when the dealer is unable to repair because of unavailability of repair parts.166 The dealer is required to use "due diligence" to obtain replacement parts; but, regardless of their unavailability, a consumer is entitled to replacement or refund remedies if the vehicle is out of service for a total of 45 days or more.167 The presumption in favor of the consumer under section 198-b shifts the burden of proof to the dealer to show that the car is not a lemon if he does not wish to replace it or give the consumer a refund.168 By setting a clear standard for a reasonable opportunity to correct defects, this law prevents dealer procrastination. In this respect, it alleviates the uncertainty faced by consumers under U.C.C. remedies, where the meaning of reasonable number of attempts is determined on a case-by-case basis.169 However, consumers still face one formidable problem of proof under this provision. The law states that, in order to require replacement, the "same malfunction or defect" must continue to exist after repair attempts have been made. Disreputable dealers may attempt to repair the same problem three times but write the receipt as if a different problem or part was dealt with on each occasion. It is likely that only alert, assertive, or mechanically knowledgeable consumers can overcome this burden.170

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164. *Id.* § 198-b(c)(2) (emphasis added).
165. *Id.* § 198-b(c)(2)(a).
166. *Id.* § 198-b(c)(2)(b).
167. *Id.*
169. *Id.* at 8.
170. *See Interview with Kathleen Weppner, supra* note 141. If problems like this occur and a consumer suspects fraud, he can file a complaint with the Department of Motor
Under subsection (c)(1), the main criterion to warrant a refund is that the malfunction or defect "substantially impairs the value of the used motor vehicle to the consumer."\footnote{171} The "substantially impairs" language is taken from U.C.C. 2-608,\footnote{172} but it is unclear whether a court applying section 198-b should adhere to the interpretation of the U.C.C. language. One commentator has suggested that it is important that the courts not be unduly constrained by prior interpretation, but should apply and interpret statutory language with specific regard to the intent and objectives of the law before them.\footnote{173} New York's attorney general, on the other hand, notes that "[t]he courts and parties can be guided by the substantial body of case law already developed under U.C.C. 2-608."\footnote{174}

If the required conditions are met, the dealer must accept the return of the vehicle\footnote{175} and "refund to the consumer the full

\footnote{171} N.Y. GEN. BUS. LAW § 198-b(c)(1) (McKinney Supp. 1987).
\footnote{172} U.C.C. § 2-608 (1977).
\footnote{173} See Note, supra note 23, at 405-06.
\footnote{174} See Memorandum of Robert Abrams, supra note 24, at 8.
\footnote{175} New York Vehicle and Traffic Law now provides for mandatory disclosure, prior to resale, of the fact that the vehicle being resold was previously repurchased pursuant to General Business Law section 198-a (new-car lemon law) or section 198-b (used-car lemon law). N.Y. VEH. & TRAF. LAW § 417-a(2) (McKinney Supp. 1987). The text of the pertinent subsection is as follows:

Certificate of prior nonconformity by manufacturer or dealer. Upon the sale or transfer of title by a manufacturer, its agent or any dealer of any second-hand motor vehicle, previously returned to a manufacturer or dealer for nonconformity to its warranty or after final determination, adjudication or settlement pursuant to section one hundred ninety-eight-a or one hundred ninety-eight-b of the general business law, the manufacturer or dealer shall execute and deliver to the buyer an instrument in writing in a form prescribed by the commissioner setting forth the following information in ten point, all capital type: "IMPORTANT: THIS VEHICLE WAS RETURNED TO THE MANUFACTURER OR DEALER BECAUSE IT DID NOT CONFORM TO ITS WARRANTY AND THE DEFECT OR CONDITION WAS NOT FIXED WITHIN A REASONABLE TIME AS PROVIDED BY NEW YORK LAW." Such notice that a vehicle was returned to the manufacturer or dealer because it did not conform to its warranty shall also be conspicuously printed on the motor vehicle's certificate of title.

\textit{Id.} This notice gives due warning to subsequent purchasers of the vehicle that it may have substantial defects, thus effectively countering any attempt at mere cosmetic repairs by the dealer. It is not clear whether the fact of prior repurchase under either lemon law would entitle the subsequent purchaser to a presumption that the car remains a lemon. At the least, the introduction of the vehicle's prior lemon status into evidence could help the purchaser prove his case. Furthermore, although it might appear that the subsequent pur-
purchase price including sales or compensating use tax, less a reasonable allowance for any damage not attributable to normal wear or usage, and adjustment for any modifications which either increase or decrease the market value of the vehicle.”

Unlike many lemon laws, however, there is no setoff allowance for use. In this respect, the New York law more correctly addresses the typical lemon situation in which the dealer enjoys the use of the consumer’s money while the consumer has not received what he bargained for—an operating car. After receiving less than he paid for, a consumer has borne the added burdens of trips to the re-

chaser assumed the risk of mechanical problems by buying a car knowing of its prior lemon status, the present lemon law protects such buyers as long as the car meets the price ($1,500) and mileage (over 100,000; notice required) provisions of the statute.

There are two means of enforcing this law—a private remedy and an action by the attorney general. An injured consumer has a right of action for damages. He can recover the greater of three times his actual damages or one-hundred dollars, as well as reasonable attorney’s fees if he prevails in the action. N.Y. VEH. & TRAF. LAW § 417-a(4) (McKinney Supp. 1987). In addition, the attorney general can apply for an injunction to “enjoin and restrain the continuance of the violation without requiring proof that any person has been damaged thereby.” If the court finds a violation in that case, with or without resultant injury, it may impose a civil penalty of up to $1,000 for each violation. N.Y. VEH. & TRAF. LAW § 417-a(5)(b) (McKinney Supp. 1987). “The failure of a dealer to deliver to the buyer the instrument required . . . or the delivery of an instrument containing false or misleading information shall constitute a violation . . . .” N.Y. VEH. & TRAF. LAW § 417-a(3) (McKinney Supp. 1987).

Laws similar to this have been enacted in several states, often as part of the state lemon law itself. See, e.g., CONN. GEN. STAT. ANN. § 42-179(f) (West Supp. 1987) (clear and conspicuous written disclosure of the fact of return); ME. REV. STAT. ANN. tit. 10 § 1163(7) (Supp. 1986) (notice must include the ways in which the vehicle did not conform to the manufacturer’s express warranties); MASS. GEN. LAWS ANN. ch. 90 § 7N½(5) (West Supp. 1987); MINN. STAT. ANN. § 325F.665(5) (West Supp. 1987) (notice required, but may not resell a car in Minnesota returned “because of a nonconformity resulting in a complete failure of the braking or steering system of the motor vehicle likely to cause death or serious bodily injury if the vehicle was driven”); WIS. STAT. ANN. § 218.015(2)(d) (West Supp. 1986) (“full disclosure of the reasons for return” required).

176. N.Y. GEN. BUS. LAW § 198-b(c)(1) (McKinney Supp. 1987). If a lienholder’s interest appears on the records of ownership kept by the Department of Motor Vehicles, subsection (c)(1) provides that the refund be made to the consumer and lienholder as their interests appear. Id. If the amount refunded to the lienholder will be insufficient to discharge the lien, the dealer must notify the consumer. Id. This notification must be in writing by registered or certified mail and must state that the consumer has 30 days to pay the balance which, with the amount paid by the dealer, will discharge the lien. Id. The notice must contain language stating that failure to make this payment within 30 days will terminate the dealer’s duty to provide a refund. Id. This provision is designed to prevent fraudulent returns and to ensure that lienholders get the money due them before the consumer gets a refund.

pair shop, inconvenience, and loss of time. For the stated reasons, a consumer should not bear the burden of a setoff reduction.

In addition to the cash paid, sales tax, and adjustment provisions for the determination of a refund, subsection (b)(1) provides that the wholesale value of a trade-in must be returned to the consumer if the trade-in itself is not included.\footnote{178}

Subsection (c)(1) provides a replacement alternative to its refund provision: the dealer may elect to replace the lemon with a comparably-priced vehicle, but the consumer may reject this offer and demand a refund instead.\footnote{179}

The dealer is provided with two "affirmative defenses" under subsection (c)(1). The first is that the malfunction or defect does not substantially impair "such value";\footnote{180} the second is that the malfunction or defect "is the result of abuse, neglect or unreasonable modifications or alterations of the used motor vehicle."\footnote{181} Although the practical value of these provisions is clear, the phrase "such value" should have been made consistent with the rest of the statute by changing it to "value of the vehicle to the consumer."

4. Enforcement of Consumer’s Rights. Subsection (f) regulates a consumer’s enforcement of his rights against dealers. In order to allow the consumer to assert his rights at a minimal cost to both parties, the law provides that if a dealer participates in a qualified informal dispute-settlement procedure,\footnote{182} a consumer must resort to this procedure before seeking a refund or replacement.\footnote{183} This provision is designed to avoid the expense and delay of litigation. It is also hoped that this requirement might serve as a catalyst to bring the dispute-settlement procedures used by auto manufactur-

\footnote{178. See supra note 134 and accompanying text.}
\footnote{179. N.Y. GEN. BUS. LAW § 198-b(c)(1) (McKinney Supp. 1987). If the consumer takes a replacement vehicle in exchange for the lemon, it is imperative that the ownership and lien interests are duly recorded. If this is done improperly or not at all, the holder of a purchase money security interest could very well find himself without recourse if the consumer defaults on payments and the original vehicle has been resold.}
\footnote{180. Id. § 198-b(c)(1)(a).}
\footnote{181. Id. § 198-b(c)(1)(b).}
\footnote{182. The procedure must comply with 16 C.F.R. Part 703 (1984). "The mediation procedure must be: (1) free of charge; (2) non-binding on the buyer; (3) explained in the car warranty; (4) a decision must be generally given within 60 days after receipt of the buyer’s complaint; and (5) the decision must be free from the influence of the dealer." P. Bienstock & S. Mindell, supra note 2.}
\footnote{183. N.Y. GEN. BUS. LAW § 198-b(f)(1) (McKinney Supp. 1987).}
ers and dealers into compliance with FTC standards. Resort to such a procedure would not limit the consumer's rights and reme-
dies under the law.

In 1985, section 198-b was amended to require dealers who use dispute-settlement procedures to ensure that participating arbitrators are familiar with the used-car lemon law by providing arbitrators and consumers who seek arbitration with a copy of the law and of the “Used Car Lemon Law Bill of Rights” now set forth in the law. This “bill of rights” sets forth in clear terms, that are directed to the consumer (“you”), exactly what rights are protected by the law and how. Most importantly, the last sentence provides the address of the state attorney general and directs consumer complaints to that office. This bill of rights is crucial because it informs the consumer of the protections of the law in clear and concise form.

One of the most important provisions for consumers is the

184. See Memorandum of Robert Abrams, supra note 24, at 8. But see supra note 37. The consumer bears the burden, however, of determining whether a dealer participates in a procedure which complies with 16 C.F.R. Part 703. This regulation has five provisions, see supra note 182, which have been the subject of much debate. The third requirement is that the procedure be explained in the warranty. Section 198-b should also require that the dealer provide the purchaser with a statement of compliance with 16 C.F.R. Part 703 to alleviate the consumer’s burden of determining compliance.


186. Id. § 198-b(f)(1).

187. Id. § 198-b(f)(1)(10). Both Kathleen Weppner of Autocap and Jerry Stromberg, Senior Consumer Frauds Representative of the New York State Attorney General's Consumer Frauds Bureau, agreed that the law would be much more effective if it actually set forth what the consumer should do to enforce his rights. The inclusion of the attorney general's address and the “Used Car Lemon Law Bill of Rights” itself are very important steps toward making information about this law available to consumers. See Interview, supra note 141; Telephone Interview with Jerry Stromberg, New York State Attorney General's Consumer Frauds Bureau (March 12, 1986).

188. Of the dealers I spoke with, only one said that he thought people actually read the warranty, but he claimed that “the public is ignorant!” The bill of rights is concise and straightforward, and consumers will probably be much more likely to read it than to read their warranty, particularly because they will be given the bill of rights to read before they go to arbitration. A serious problem exists with this provision, however. In Western New York there is no arbitration procedure which complies with the requirements of the statute. See Interview, supra note 141. Since the bill of rights is given only to a consumer who seeks arbitration, no consumer in this area will receive this important statement of his rights unless he reads the law itself. Because the procedure provided must be free of charge, see supra note 182, it may be some time before a procedure complying with the requirements is created. For this reason, and to enable consumers to better preserve their rights through recordkeeping and prompt action, this bill of rights should be given to the consumer at the time of sale before problems occur.
discretionary award of attorney's fees to a prevailing plaintiff under subsection (f)(4) of the statute.\footnote{189} This is a reflection of the trend toward making private remedies more realistically available to consumers.\footnote{189} One commentator notes that "[t]he economies of private litigation make the recovery of costs and attorneys' fees crucial remedies if private enforcement of remedies is to be a workable option for consumers."\footnote{191}

5. General Provisions. Subsection (d) of the used-car lemon law protects the consumer's rights and limits the coverage of this law. First, the law states that purchase agreements which waive, limit, or disclaim rights under this article "shall be void as contrary to public policy."\footnote{192} Subsection (d)(2) is a crucial protection for the consumer; it states that "[n]othing in this section shall in any way limit the rights or remedies which are otherwise available to a consumer under any other law."\footnote{193} Finally, the law sets a four-year statute of limitations beginning on the date of original delivery of the vehicle to the consumer.\footnote{194}

IV. Policy and Effects of Section 198-B

As has been the case with the specific provisions of the used-car lemon law, the overall policy of the law and its effect on dealers and consumers have been subjects of much controversy. This Section will examine the effect of this statute and consider the validity of the policy criticisms leveled against it.

A. The Policy

The policy behind new-car lemon laws has been expressed as a desire to increase the accountability of the manufacturer to consumer problems with new cars.\footnote{195} In the case of used cars, unless the original manufacturer's warranty still applies,\footnote{196} the consumer

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\footnote{189. N.Y. GEN. BUS. LAW § 198-b(f)(4) (McKinney Supp. 1987).}
\footnote{190. See Donnelly & Donnelly, Commercial Law, 35 SYRACUSE L. REV. 97, 165 (1984).}
\footnote{191. See Note, supra note 7, at 1129 n.14.}
\footnote{192. N.Y. GEN. BUS. LAW § 198-b(d)(1) (McKinney Supp. 1987).}
\footnote{193. Id. § 198-b(d)(2).}
\footnote{194. Id. § 198-b(f)(5).}
\footnote{195. See Note, supra note 7, at 1148 n.121.}
\footnote{196. A warranty may continue to apply to a repurchaser in the case of a used Rolls, Bentley, Jaguar or BMW automobile covered by the manufacturer's used-car warranty, or where a transfer is made to a qualified person during the manufacturer's warranty period. See supra notes 25 & 140.}
has no recourse against the manufacturer. The statutory warranty created by section 198-b holds dealers to a limited strict liability standard and requires them to offer a minimum warranty for all vehicles covered by the statute.

One commentator argues that "the traditional fourfold rationale for strict liability—enterprise liability, market deterrence, compensation, and implied representation—does not support extending it to unmodified used products." Under the theory of enterprise liability, the risks of accident or malfunction are included in the price of a good; consumer prices rise, and consumers are discouraged from buying risky goods because of their higher costs. Difficulties may arise, however, where individuals are not "dealers" under the statute:

[If] strict liability is imposed on a product which has a substitute not covered by strict liability, consumers may switch to the substitute because it is now cheaper. If the substitute—usually a product sold by a noncommercial seller—is much riskier and cannot itself be made the subject of strict liability, and if consumers do not accurately assess its risks, then strict liability will be counterproductive and increase the total cost of accidents [and defects].

The market deterrence objective of strict liability is usually focused on the manufacturer and is intended as an incentive to enhance product safety. In the used-car instance, however, the law raises costs to the dealer but does not prevent defective used cars from being sold; it merely shifts the sale of defective used cars to the nondealer sector. The cost of cars purchased from dealers increases while the cost of cars purchased from individuals remains the same. It has been pointed out that "holding retailers [especially independent retailers] strictly liable would not necessarily induce manufacturers to improve the safety of product design or construction . . . [and that] retailers are poorly situated individually to improve the safety of used products." Furthermore, "[w]here strict liability changes the practices of retailers, it may encourage consumers to buy riskier noncommercial products."

198. Id. at 537.
199. Id. (footnotes omitted).
200. Id. at 539.
201. Id. at 540.
202. Id. at 542.
The compensation justification is the primary motivation for imposing a standard of limited strict liability on used-car dealers under section 198-b. Under prior law, consumers were essentially without effective remedies and this law was seen as a way to compensate them for their losses. Though this law has been said to take the burden away from the consumer and appropriately shift it to industry, it must be recognized that this industry is mostly composed of small, independent dealers, not large manufacturers, as is the new-car industry.

Still, a used-car dealership which raises the cost of cars to cover its inspection and warranty costs is in a better position to cover a consumer's loss than is the consumer.

The implied representation justification for strict liability also comes into play here. This policy originates in an implied warranty of merchantability. The implied representation of safe use has been expanded and converted into an express warranty under section 198-b, to more effectively protect the consumer's expectations, not only of safety but also of fitness for a particular purpose. However, this expansion has been criticized as inappropriate. One court noted that "[t]he used product market . . . functions on the tacit understanding that the seller, even though in the business of selling such products, makes no particular representation about their quality simply by offering them for sale."

Though strict liability is usually extended to protect consumers' health and to prevent accidents that result from defective or

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203. See generally, Memorandum of Robert Abrams, supra note 24.
204. Id. at 7.
205. The cost-spreading idea is cited quite often as a justification for imposing additional costs and liabilities on businesses. It should be kept in mind, however, that there is a point after which this can become inequitable, especially in the used-car market where dealers are also competing with private sellers who can sell at lower prices.
206. See infra note 213.
207. See Note, supra note 197, at 544.

As to this, at least, there has been a definite change in our social philosophy. It is now generally recognized that a manufacturer or even a dealer has a responsibility to the ultimate consumer, based upon nothing more than the sufficient fact that he has so dealt with the goods that they are likely to come into the hands of another, and to do harm if they are defective.

unreasonably dangerous products, the New York State legislature has applied only a limited strict liability to used-car dealers under section 198-b, holding them to a minimum standard on each car they sell. The "efficiency criteria"\textsuperscript{209} of enterprise liability and market deterrence militate against a further extension, primarily because the relationships between used-car buyers and manufacturers and between used-car dealers and manufacturers are such that the manufacturers are not greatly influenced by consumer-dealer interaction.\textsuperscript{210} Because less than half of used-car dealers are associated with new-car dealerships and thus with manufacturers, most used-car dealers sell cars made by a variety of manufacturers, thereby further lessening the impact of dealer strict liability on any given manufacturer. Furthermore, the availability to consumers of a less costly alternative may undermine the dealers' market if dealers are not able to keep their costs low in the face of the state's efforts to increase their potential liability and hence their risk. The "equity criteria,"\textsuperscript{211} on the other hand—compensation and implied representation—particularly the former, are well served by the statute.

The policy of protecting consumers through a legislative provision such as section 198-b has not been subject to significant challenge. What has been objected to is the extent of the protection and the provisions chosen to implement the policy. It has been said that the extension of the protection to encompass a long list of "covered parts" will have a negative impact on competition within the used-car market.\textsuperscript{212} The general approach taken by the law has been criticized, and two alternatives have been suggested. New York State Automobile Dealers, Inc. believes that section 198-b "is [an] unnecessary intrusion into the marketplace by government, and that the problems which exist in the used car market could better be addressed by changes in the Vehicle & Traffic Law with regard to licensing."\textsuperscript{213} The association points out that

\begin{itemize}
  \item \textsuperscript{209} See generally Note, supra note 197, at 548.
  \item \textsuperscript{210} Manufacturers who offer used-car warranties would be an exception to this proposition. See supra note 25.
  \item \textsuperscript{211} \textit{Id}.
  \item \textsuperscript{212} See Memorandum of Donald J. Boyle, supra note 127, at 2. Jerry Stromberg of the state attorney general's office, on the other hand, proposes that this law would be improved by expanding the list of covered parts. Telephone Interview with Jerry Stromberg, supra note 187.
  \item \textsuperscript{213} Memorandum of the New York State Automobile Dealers, Inc. 1 (contained in
private citizens and independent car dealers make up more than half of the used-car marketplace yet do not face the strict rules and regulations that franchised new-car dealers do.\footnote{Memorandum of the New York State Automobile Dealers, Inc., supra note 213.} The association states that “[t]he requirements for obtaining a license to sell new or used vehicles is [sic] simplistic to the point of being ridiculous—basically filling out a form and handing over a fee!”\footnote{Id.} It suggests that “this would be the logical place to correct the abuses in the marketplace.”\footnote{Id.}

An alternative approach to addressing the problems that used-car buyers face has been taken by the federal government.\footnote{See supra notes 65-81 and accompanying text.} The federal approach is markedly different from that taken by the New York State legislature. Most notably, it is more preventive, allowing consumers to know what they are promised so that they can make an informed purchase and providing them with a mechanism to enforce this promise. This involves seemingly less “intrusion” by the government because, though the federal rule provides for compelled disclosure of warranty provisions, it does not set any of the terms of the contract of sale by determining, as the New York law does, just what the buyer’s warranty must cover.

**B. Effects of Section 198-b**

1. *Dealers’ Burdens and Benefits.* The impact that the used-car lemon law will have on dealers is still hard to ascertain, but it seems clear that its provisions do not impose extraordinary burdens. The memo of the attorney general in support of this law states that the law “imposes no unreasonable demands on legiti-
mate dealers, and only impacts negatively on those irresponsible dealers who regularly sell defective cars."\textsuperscript{218} The Car and Truck Renting and Leasing Association, on the other hand, states that "[t]he responsible used car dealers who will do everything within their power to comply with the law are the ones who are hurt by this bill. The irresponsible dealers will continue to sell vehicles without any warranty, manufacturing differing dealership names, if necessary, to get around the law."\textsuperscript{219}

The key word in the first statement is the qualification of the law's demands as not "unreasonable," since it is clear that the law does impose some burden on dealers. Dealers must familiarize themselves with the law, in part because they are required to abide by it, and in part to be able to take advantage of the permitted exclusions from warranty coverage. As a result of the law, dealers must now make arrangements to provide the statutory warranty either on their own or through a warranty company, and they must make certain each customer is given a written copy of the warranty. Since the enactment of the law, many dealers are also much more careful with respect to the cars that they purchase for resale. Another result of the law is that many dealers have determined that it is no longer profitable to sell cars for less than approximately $3,000 because of the risk and costs added by the lemon law.\textsuperscript{220} Thus, a disparity in dealer prices has resulted. A consumer can pay $3,000 and up for a car with a statutory warranty, or less than $1,500 for a car with little or no protection. His only alternative is to buy from an individual seller, where the doctrine of caveat emptor still prevails.

Though the prediction by the Car and Truck Association about the possibility of fabricated dealership names seems somewhat farfetched, it does appear that this law will place a greater burden on honest dealers than on dishonest ones. Honest dealers who try to comply with the law will certainly have to raise their prices to cover their added costs, thereby giving dishonest dealers a competitive advantage. Furthermore, those dealers who bet on

\textsuperscript{218} Memorandum of Atty. Gen. Robert Abrams reprinted in 1984 N.Y. LEGIS. ANN. 223 (discusses addition of § 198-b of the General Business Law). This statement does not acknowledge, however, the problems sometimes faced by dealers in ascertaining whether an automobile is defective.

\textsuperscript{219} See Memorandum of Donald J. Boyle, supra note 127, at 2.

\textsuperscript{220} But see Interview with Jim Krentz, supra note 127.
consumers' inaction—"lumping it," or lack of knowledge about their rights—may also be more competitive in the used-car market than those who carefully evaluate each car and price it accordingly.

The following scenario highlights another disparate effect of the law on the price of used cars offered for sale. Car A is in good condition with no observable present or potential defects. The dealer can perform an inspection and offer it for sale for its value plus the dealer's markup, say $10,000. Car B is in poorer condition—a good candidate for lemon status. The dealer does an inspection and offers it for its value plus the dealer's markup and a margin to protect the dealer in case of litigation or repairs made necessary under the lemon law, again $10,000. Here, two cars of very different quality cost the same amount of money. Assuming the dealer is not disreputable and does not attempt to deceive consumers with respect to the quality of each car, it will be difficult for the dealer to sell the lower-quality car at the lemon-law influenced price if the higher-quality car is available at the same price. This is certainly a simplified example, but it illustrates one potential effect of the law. A different result would obtain, however, if the dealer priced the car in the usual way and then added a flat warranty cost to the price of every car. The final prices would then reflect the disparity in quality between the two cars. It is not clear which of these methods would be more commonly used under the law. The latter is less time consuming, however, and will probably be used by dealers who buy their warranties from warranty companies.

Alternatively, for a lower-quality car, a dealer may decide not to risk lemon-law coverage and may lower his markup where possible until the price of the car falls just below $1,500, the minimum coverage amount.221

Dealers in New York do receive some benefits under this law, however. Dealers that I spoke with were pleased with the law in one respect—that it clearly sets forth their responsibilities to consumers. Similarly, it has alleviated some dealers' fears about the uncertainty of courts' interpretation of the U.C.C. as it applies to the sale of used cars.

221. Many independent used-car dealers in Western New York are displaying a substantial number of cars listed at prices such as $1,495.
2. Consumers' Benefits and Burdens. The primary benefit for consumers under section 198-b is that their rights with respect to the purchase of defective motor vehicles have been clarified through a statute specifically tailored to confront the problems they face. Consumer education about the law, however, is still deficient. According to the used-car dealers I spoke with, most consumers are aware that the law exists but are misinformed about its provisions. One dealer was taken to court over a radio antenna, which is not covered by the statute; another was called by the state attorney general's office about a consumer's complaint regarding noncovered parts; and a dealers' association has often been contacted about such things as door locks, electrical problems, and bad valves and rings, none of which is covered by the statute. One customer, before even requesting repairs, actually returned the vehicle to the dealer's lot, informed the dealer that he had returned it "under the lemon law," and defaulted on his payments until the bank reposessed the car.

This deficiency in awareness could be ameliorated if consumers would read the warranty they are given when they buy a used car. Most dealers I spoke with agreed on this point: consumers do not read their warranties, at least not until a problem with the covered car arises. In fact, most sales agreements contain a provision in red ink stating: "I have read and understand . . . [etc.]," yet consumers still sign without reading. However, this fact is often partially attributable to impatience and intimidation manifested by high-pressure salesmen.

Consumer awareness of the law was addressed by the 1985

222. See Interview with Jim Krentz, Sr., supra note 127.
223. Interview with salesperson (March 11, 1986).
224. See Interview with Kathleen Weppner, supra note 141.
225. See Interview with salesperson, supra note 223.
226. When Kathleen Weppner, Autocap Director, Niagara Frontier Auto Dealers Association, told a salesperson that she would just take a few minutes to read the warranty before signing the contract when buying her car, the salesperson gave her a shocked and irritated look, asking: "You're going to read it?" She suggested that the exasperation and irritation of the salesperson is often enough to intimidate consumers into not reading material that they might otherwise have read. Interview with Kathleen Weppner, supra note 141.

Also common is the mistaken assumption by buyers that the documents that affect the sale are merely routine. One Autocap customer signed the bank papers without reading them, only to find that he had also waived his right to an extended service policy on the car he had just bought. Id.
amendment requiring dealers to provide consumers headed to arbitration, and arbitrators themselves, with a copy of the "Used Car Lemon Law Bill of Rights," a straightforward and concise explanation of the law's provisions. In Western New York, it should be noted, consumers are unlikely to receive a copy of the "bill of rights" from a dealer because there is no arbitration proceeding in this region which complies with the requirements of the statute. Though Autoline (run by the Better Business Bureau) and Autocap (a service provided by the Niagara Frontier Auto Dealers Association) are both active in resolving consumer disputes, neither meets the statutory criteria.

Opinions about the arbitration provision mandated by the statute have varied. Dealers have been generally in favor of the provision because it saves them time and attorney's fees, and because it allows both parties to present the issues as they see them, in a more "human" style. Since there is no arbitration proceeding in this area complying with the statute, it is difficult to predict the effect of the used-car lemon law's arbitration provision. Although the new-car lemon law's arbitration provision is not identical to the used-car law, its object is the same and it may provide a useful basis for evaluation. A 1986 review of the new-car provision's effectiveness found substantial noncompliance with the requirements of [Part 703], and also that "numerous arbitration decisions have failed to follow the guidelines of subdivision (c) of 198-a," which specifies the amount of money to be returned to the consumer when a buy-back under the law takes place. Judging

228. See supra note 182.
229. Interview, supra note 141.

Many arbitration decisions, which fail to apply statutory remedies, may be attributed to an arbitrator's lack of familiarity with the law. But it has been the general position of the manufacturers that the arbitration awards in their dispute settlement procedures need not be consistent with that law. Indeed, some manufacturers have agreed not to assert a consumer's failure to use the program as a basis for dismissal of lemon-law actions and have labeled their programs as purely "voluntary" in nature. But even if consumers can by-pass arbitration and proceed directly to litigation with the manufacturer's prior consent, this wholly unrealistic scenario defeats the whole purpose of the law. Few consumers can bear the additional delays and expense attendant to litigation. Consequently, the vast majority of consumers must be content with an arbitration award, and for this reason that award should conform to the law.
from the new-car law results, if arbitration is to serve its purpose as a viable alternative to litigation under the used-car lemon law, it may be necessary to relax or alter the arbitration requirements, or to set in motion a conforming arbitration program. Dealers I spoke with have stated that a reputable dealer would not let a case go as far as arbitration. They felt that because car buyers are often repeat customers and because dealer reputation is spread largely by word of mouth, dealers are usually willing to make concessions, negotiate, or otherwise take care of their customers.

Dealer misperception about the law exacerbates the problem of consumers' lack of awareness. While most dealers have been informed of the law through the dealers associations or the department of motor vehicles, one dealer told me that he was certain that it required a window sticker displaying the warranty, and another was certain that the law provided for a fifty/fifty split warranty—not repair "at no cost" to the consumer. Neither belief is accurate. Although a sticker is not required by the law, if it is properly printed and accurately filled out, it would be helpful in informing the consumer of his rights. Another deficiency of the lemon law is in its failure to protect those who may perhaps need it the most. In implementing a policy of consumer protection, the legislature has not addressed the problems of persons with limited incomes who are most likely to purchase used cars. Because they buy less expensive used cars, these people are forced to turn to nondealer sellers (or to the few dealers that sell cars for under $1,500). Nondealer sellers are not all unscrupulous, but the doctrine of caveat emptor is still the rule governing their sales. A consumer who buys from a nondealer seller usually has little recourse because no official contract or agreement was made, because the seller made no representations, because the seller is not a professional seller, or perhaps because the seller cannot be located at the time the automobile fails. However, protection for purchasers of cars from nondealer sellers would be difficult to implement. Societal attitudes, combined with the varied composition of this seller category, makes such protection difficult to design and nearly impossible to enforce. Still, the problems faced by those who must turn to nondealer sellers must not be ignored, particularly because one effect of the lemon law will likely be to increase

Id. See also supra note 37.
the cost of used cars\textsuperscript{231} and thus lessen the likelihood that people with low incomes can afford to buy vehicles protected by a warranty from professional sellers.

The law also places a somewhat significant burden on consumers who wish to enjoy its protections. A buyer should now keep accurate records about his used car: when it was purchased, what repairs were made, when, and by whom, in order to enforce his rights effectively under the lemon law.\textsuperscript{232} Recording repairs can be difficult because often more than one part will fail at once. One failure may be of a covered part while another may not. Mechanics are often vague or may neglect to explain to a consumer exactly what, why, and how a part was repaired. Such difficulties in record keeping may be exacerbated by the fact that the repair, under the lemon law, must be done by the dealer or his agent, whose best interests usually do not lie with fully informing the consumer of the mechanical condition of the vehicle.\textsuperscript{233} Because consumers must keep accurate records to assure protection, the law should require that they be informed of their rights under the law (i.e., be given their "bill of rights") when they buy the car, because if they do not become aware of their rights until they consult a lawyer or seek arbitration, they may not have sufficient documentation to be awarded a remedy even if they otherwise qualify for one.

Regardless of the lemon law's shortcomings, consumers derive substantial benefits from it.\textsuperscript{234} The statutory warranty itself covers the parts which are required for an operating car.\textsuperscript{235} The statutory definition of a "reasonable opportunity to correct malfunction or defect" eliminates the uncertainty a consumer faced under the U.C.C.\textsuperscript{236} The subjective standard that a defect must "substantially impair" the value of the vehicle to the consumer makes fulfillment of the consumer's expectations much more likely.\textsuperscript{237} The presumption which shifts the burden of proof to the

\begin{itemize}
\item \textsuperscript{231} Note, Redhibition: An Argument for the Adoption of a Professional Seller Standard for Automobile Dealers, 43 LA. L. REV. 1101, 1108 (1983).
\item \textsuperscript{232} See P. Biernstock & S. MindeLL, supra note 2.
\item \textsuperscript{233} Interview, supra note 141: N.Y. GEN. BUS. LAW § 198-b(c)(1) (McKinney Supp. 1987).
\item \textsuperscript{234} See Memorandum of Robert Abrams, supra note 24, at 7.
\item \textsuperscript{235} N.Y. GEN. BUS. LAW § 198-b(b)(2) (McKinney Supp. 1987).
\item \textsuperscript{236} Id. § 198-b(c)(2).
\item \textsuperscript{237} Id. § 198-b(c)(1).
\end{itemize}
dealer to show that the vehicle is not a lemon places the burden on the party with the technical expertise and knowledge to carry this burden and alleviates the substantial proof problems formerly faced by a consumer. 238 The informal dispute resolution procedures encouraged by the statute can eliminate much of the delay faced by consumers who, under the U.C.C., often could not use their car while a lawsuit was pending. 239 Furthermore, the discretionary award of attorney’s fees to prevailing plaintiffs can result in consumers being much more likely to assert their rights under the law because they have greater assurance that a court proceeding will be worth the cost. 240

C. Case Law—The Used-Car Lemon Law in Practice

Only one case decided under section 198-b has been reported to date. In Bouchard v. Savoca, 241 decided in August 1985, a purchaser whose 1970 Datsun 280 ZX had broken down six times and had been out of service for a total of fifteen days brought suit against the dealer who had sold it to him when the dealer refused to refund the $10,178.95 purchase price upon return of the automobile. All six breakdowns of the vehicle occurred within approximately a two-week period immediately following its purchase.

The Supreme Court of Albany County held that the “frustrations outlined by plaintiff after purchase of the vehicle in question [were] sufficiently detailed in his affidavit” and granted the plaintiff’s motion for summary judgment stating that the plaintiff was “absolutely entitled to demand a refund.” 242

The court followed the intent and policy of the law, stating that the “time for determining the existence of the malfunction is when the consumer returns the vehicle for the last time to the dealer” 243 and that it “matters not that defendants now claim that the vehicle has been fixed and is in ‘superior condition.’ ” 244 This interpretation of the statute prevents a dealer from repeatedly accepting the vehicle for unsatisfactory repairs, then miraculously

238. Id. § 198-b(c)(2).
239. Id. § 198-b(f).
240. Id. § 198-b(f)(4).
242. Id. at 506-07, 493 N.Y.S.2d at 418.
243. Id. at 507, 493 N.Y.S.2d at 418.
244. Id.
fixing it as soon as a legal claim is brought. Though in this case, the "only logical conclusion [was] that defendants did indeed attempt to service the recalcitrant vehicle, at their own expense, and as expeditiously as possible," the court followed the legislative intent and held that "their good faith attempts do not defeat plaintiff's right to redeem the vehicle for the purchase price in the event that the malfunction goes uncorrected as aforesaid."245

The court also recognized that "prolonged litigation will only serve to defeat the intent of the statute,"246 describing the lemon law as "enacted to provide some measure of relief to purchasers of used vehicles."247 The court further stated that "[i]n essence, the Legislature has determined that, in the game of used car sales, three strikes and you're out."248

Finally, the court awarded $1,605 in "reasonable attorney's fees necessitated in the commencement of a litigation" to the plaintiff's attorney,249 again furthering the statutory intent of providing a workable remedy to owners of lemons.

This first lemon-law case is definitely a step forward for used-car consumers' rights, as well as for the lemon law itself. This court has correctly applied the law to the facts in this case and has made a determination that follows the law and serves its intent. If other courts do the same, this law will be a crucial and effective protection for used-car buyers in New York State.

V. CONCLUSION

New York State's used-car lemon law is a consolidation of remedies that has been specifically tailored to the problems often faced by used-car buyers. Though the law has its weaknesses (an approach more focused on providing consumer information, similar to the FTC rule, but with consumer-enforcement provisions might be more effective) the law is an important clarification of consumers' rights with respect to used vehicles. It is a legislative recognition of a consumer's minimum expectations of this important yet often troublesome purchase. It alleviates some of the obstacles consumers previously confronted when attempting to en-

245. Id. at 507, 493 N.Y.S.2d at 419.
246. Id. at 507, 493 N.Y.S.2d at 418.
247. Id.
248. Id.
249. Id. at 507, 493 N.Y.S.2d at 419.
force their rights under the law against automobile dealers.

In addition to the difficulties present in the application of specific provisions, it is important to remember that the law will have little protective effect if consumers are unaware of their rights under it. One of the biggest problems for consumers, consumer advocates, and dealers, in trying to apply the law, is uninformed or misinformed parties. A window sticker requirement similar to that in the federal rule, would be one way to communicate this information in a manner that would cause both dealer and consumer to take notice of it. This sticker could list general rights under the law, warn consumers about the dangers of oral promises, and give a phone number to call for more detailed information about the law. Several dealers in Western New York now present the required warranty information in sticker form. The sticker has the advantage of communicating consumer rights to prospective buyers before they make the decision to purchase.

The additional burden on dealers would be minimal if the law also required that a window sticker describing any warranty coverage voluntarily offered by the dealer or manufacturer, as well as a notice that the lemon law does not apply to the car, be affixed on all cars that sell for less than $1,500. Thus, consumers who can only afford to purchase these less expensive used cars would still be afforded a degree of protection under the law, as they would at least be informed of any warranty rights that they have purchased. Similarly, when a written statement reporting a mileage figure exceeding 100,000 miles is given to the consumer, it should be required to state explicitly the consequent exclusion from the used-car lemon law protection.

Despite its few inadequacies, the New York used-car lemon law is an important clarification and policy statement affording previously neglected used-car buyers the same protections given to new-car buyers. The legislature, through its recent statutory enactments, has demonstrated its attentiveness to consumer concerns by modifying the law when the need for protective provisions has arisen. This Comment has offered a critique of its present provisions and some suggestions as to needed future reforms. Continued study and improvement of the used-car lemon law will further the already important addition it has made to consumer's rights in New York State.

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