

Car Trouble: Some Help for the Uninformed Buyer

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Vehicle purchasers have been in need of help for quite some time now. This Note discusses reasons for this observation, by examining the legal framework that allocates a significant and disproportionate amount of bargaining power to the seller in the typical transaction. Possible sources of this disparity are problems relating to consumer literacy and racial discrimination, issues that are discussed in detail. These problems are considered in the context of warranty disclaimers and the sale of used cars, an area of the law that is particularly hospitable to advancing the interests of car dealers. The federal and state laws pertaining to this area are ineffective at relieving consumer distress.

This Note advocates taking an approach that would give consumers more information before signing the sales agreement, increasing their bargaining power and therefore allowing them to escape a potentially problematic situation by asking more questions and bargaining with the seller for more favorable terms. This is in stark contrast to much of the recently passed, popular legislation that has focused on providing a remedy for the car purchaser only after a problem has already been created. Changing the Uniform Commercial Code and encouraging states to adopt the amendments would be a significant step in the course of protecting consumers who have historically faced serious "car trouble."

I. INTRODUCTION

Mike Dowdall could have used some help when he was shopping for a truck in the spring of 1999.¹ He thought that the local used car dealership was a reputable business and that he could get a suitable truck for work there at a reasonable price.² A friendly dealer directed Mr. Dowdall to a white Ford pick-up truck that seemed to be in good shape with a relatively low number of miles on the odometer.³ Dowdall was told that the vehicle was a trade-in from one of the

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¹ Mr. Dowdall's story was a feature in *The Pitch*, a newspaper in Kansas City, Missouri. Allie Johnson, *Hell on Wheels: Wrecked and Abused Rental Cars Get a New Lease on Life at Shawnee Mission Ford*, KAN. CITY PITCH WKLY., Sept. 5, 2002, at 1, available at <http://www.pitch.com/issues/2002-09-05/news/feature.html> (last visited Feb. 26, 2005).

² *Id.*

³ *Id.* A pick-up truck was the natural choice for Mr. Dowdall because he was shopping for a vehicle that could transport both people and materials to and from work. *Id.*

dealership's frequent customers.⁴ This, in fact, was not the case. The truck was actually purchased from the residential driveway of an ex-convict who sold vehicles that were previously used as rentals for Enterprise Rent-A-Car®.⁵ The truck had been wrecked in the past and required serious repair work because of all of the defects.⁶ Dowdall was subsequently contacted by the National Highway Traffic Safety Administration, and was informed that the odometer had been "rolled back" on his truck.⁷ The truck was also returned to the dealer after the previous purchaser, Don Wagner, discovered that there were serious mechanical defects and demanded a refund.⁸ But this did not prevent the dealership from selling it soon after it had been returned—without disclosing any of the defects that justified the recent refund.

Dowdall's case is an extreme example of how consumers get cheated by car dealers who take advantage of buyers. The ex-con from whom the dealership was buying had recently sold vehicles to twelve major car dealers and five smaller dealers with locations in Kansas and Missouri.⁹ The law firm that Dowdall contacted had won similar lawsuits against the same dealership ten years before Dowdall contacted them.¹⁰ Although an attorney for this firm claims that he can recognize previous damage and signs of odometer rollback,¹¹ the used car manager and the saleswoman of the car dealership who dealt with Dowdall both claimed that they were not able to make the same identification from their limited training.¹² This example of a typical consumer's problems with a used car dealership shows that the current legal system in place to protect consumers does

⁴ *Id.*

⁵ *Id.* Although the dealership could have purchased the cars from the rental car firm itself for less money, it chose to go through the two-time felon. *Id.*

⁶ *Id.* The amount of money that Dowdall lost as a result of repair and improvement costs to the truck nearly exceeded the price that he paid to purchase the vehicle. *Id.* It is likely that Dowdall would have a cause of action under the Unfair and Deceptive Acts and Practices statutes of most states. See *infra* note 117 and accompanying text.

⁷ Johnson, *supra* note 1. The actual number of miles that the truck was driven was more than twice what the odometer displayed. *Id.* The dealership most likely was violating both federal and state law by tampering with the odometer on the truck. Federal law prohibits both tampering with odometers and transferring title to vehicles with odometers that are known to have been changed. 49 U.S.C. §§ 32703, 32705 (2000). Federal law also does not affect state laws that prohibit tampering with odometers. 49 U.S.C. § 32711 (2000).

⁸ Johnson, *supra* note 1. Wagner was met with resistance when he demanded that the dealership buy back the defective truck.

⁹ *Id.*

¹⁰ *Id.* Despite the fact that the dealership had already paid a substantial award of damages for this prior suit, it apparently had not significantly changed its business practices.

¹¹ *Id.*

¹² *Id.* The attorney claims that all dealers are able to identify previously damaged vehicles. *Id.*

not prevent the initial harm to buyers and does not cause the dealerships to change their ways to avoid liability.

In many commercial transactions, consumers are outmatched by the seller in terms of bargaining power. This disparity is especially significant in the context of purchasing an automobile and dealing with warranties because the current state of consumer law does not allow for any remediation. Popular legislation, including state lemon laws, is aimed at helping consumers recover after the contract has already been completed. The Uniform Commercial Code ("UCC"), which has been adopted by each state in some form, provides consumers with numerous protections.¹³ However, these protections can easily be waived by the buyer if the seller includes a disclaimer that the buyer unknowingly accepts.¹⁴ But if states adopted significant changes in the disclaimer requirements of the UCC, consumers would acquire a better understanding of the protections that they have and would be able to bargain on an equal footing with car dealers.

This Note defines specific problems that consumers face when purchasing automobiles and proposes solutions to those problems. Part II outlines the relative importance of purchasing automobiles to consumers and the problems that consumers face with auto dealers who have a bargaining power advantage. Most consumers do not have the level of literacy necessary to fully understand a car purchase contract. Spanish-speaking consumers confront problems with English-language contracts and African-American consumers deal with racial discrimination from car dealers. Part III analyzes the legal relief that is currently available to consumers under state and federal law. The state of the law regarding consumer protection today is inadequate to remedy the bargaining power disadvantage that car buyers face. Part IV undertakes to help out consumers by requiring the inclusion of better disclosures in purchase contracts. Changing the UCC disclaimer provisions to make it more difficult for car dealers to void the implied warranties will increase bargaining and prevent consumers from being surprised later if they run into costly mechanical problems with their vehicles.

¹³ The Uniform Commercial Code is a model law for states to adopt as their primary commercial law. Article 2 of the UCC pertains to sales. The writing and revision of the UCC is done primarily by the American Law Institute ("ALI") and the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). These organizations consist of attorneys, judges, professors, and other scholars from the legal community. Many states have adopted the UCC as their primary sales law with some minor alterations. Any significant changes made to the UCC will cause state legislatures to recognize that a change in their respective versions may be in order.

¹⁴ Sellers are able to disclaim warranties by including the phrase "as is" in the contract as notice to buyers that they are not protected by implied warranties. U.C.C. § 2-316 (1999). See *infra* note 80 and accompanying text.

II. ANALYSIS OF A CAR PURCHASE

Purchasing automobiles is very important to consumers and to the economy because vehicles are generally very expensive. The purchase of a car is often second in importance only to the purchase of a home.¹⁵ Despite the importance of these purchases, there is a significant disparity in the amount of commercial sophistication that exists between the seasoned car dealer and the unsuspecting consumer. Because of this disparity in commercial sophistication, consumers have a bargaining power disadvantage because they cannot use the knowledge of legal protection as leverage when negotiating.

A. *The Importance of Car Purchases*

Automobile purchases are very important to both parties to the contract. Although used cars are generally less expensive than new cars, used vehicle sales still account for a significant amount of money.¹⁶ This Note focuses mainly on the actions of used car dealers regarding the warranty provisions that they offer (or deny) buyers.¹⁷ Consumers must understand that they need to do some serious research before spending a significant amount of money on a vehicle, because car buying has been considered dangerous by consumer advocates.¹⁸ These advocates claim that they are on the same side as the buyer by making it seem as

¹⁵ A car purchase may be *third* in importance if a consumer pays for graduate school because the price of higher education, especially legal and medical school, is much greater than that of most vehicles. John R. Kramer, *Legal Education in an Era of Change: Will Legal Education Remain Affordable, by Whom, and How?*, 1987 DUKE L.J. 240, 247 (1987).

¹⁶ Franchised new car dealers sold 19.4 million used cars for an average price of \$13,850 each in 2002, making total sales of almost \$270 billion. NATIONAL AUTOMOBILE DEALERS ASSOCIATION ANALYSIS DIVISION, NADA DATA, THE USED-VEHICLE DEPARTMENT, http://www.nada.org/Content/NavigationMenu/MediaCenter/NADADData/20033/NADADData_usedvehicle.pdf (last visited Feb. 26, 2005). This confirms the writings of some commentators who predicted increased used car sales due to better made and maintained cars. See Bruce Mann & Thomas J. Holdych, *When Lemons Are Better Than Lemonade: The Case Against Mandatory Used Car Warranties*, 15 YALE L. & POL'Y REV. 1, 5 (1996).

¹⁷ Vehicle manufacturers may actually afford "secret" or "good-will" warranties to consumers without their knowledge, giving extra protection to new car buyers. Jeff Sovern, *Good Will Adjustment Games: An Economic and Legal Analysis of Secret Warranty Regulation*, 60 MO. L. REV. 323, 325-26 (1995). Manufacturers will allow dealers to make the repairs for free if the dealer believes that the consumer is likely to buy again from the manufacturer. *Id.* at 334-35. Used cars normally have less warranty protection than new cars.

¹⁸ "Auto Purchases and Lease Fraud" is currently on the Top Ten Hot Topics list at ConsumerVoiceUSA.com. Consumer Voice USA Homepage, <http://www.consumervoiceusa.com/> (last visited Feb. 26, 2005).

if the dealer and buyer are at odds in a contractual battle.¹⁹ Despite all of the warnings from these advocates, consumers are probably not as careful as they should be before they sign a purchase contract for a car.

The average consumer is a profitable target for experienced car dealers for a variety of reasons. Despite the fact that there is a wealth of information involving car-buying strategies on the internet²⁰ and in print,²¹ many consumers still face an informational disadvantage when compared with car dealers. Common experiences include high-pressure, hurried sales, and complex paperwork that goes unread.²² The price and other features of the product tend to be the main points of concern, resulting in consumers not reading warranty information in the typical case.²³ Common dealer add-ons may include expensive service contracts, extended warranties, and insurance that is not needed.²⁴ The most common responses to the question of how dealers could improve the buying experience for consumers were for dealers to lessen the amount of pressure in sales and to increase their levels of honesty, according to a survey of new-car buyers.²⁵

¹⁹ "Car dealers hate us ... You'll Love us" is the slogan for CarBuyingTips.com. CarBuyingTips.com Homepage, <http://www.carbuyingtips.com/> (last visited Feb. 26, 2005).

²⁰ There are a variety of websites that are useful to consumers by allowing them to compare prices of new and used cars and learn about common dealer "scams." See, e.g., <http://www.carbuyingtips.com/> (last visited Feb. 26, 2005); <http://www.edmunds.com/> (last visited Feb. 26, 2005).

²¹ See, e.g., MARK ESKELSON, WHAT CAR DEALERS DON'T WANT YOU TO KNOW (1995); *Buying Tips: Tricks of the Trade*, CONSUMER REPS., Apr. 2003, at 17.

²² Michael J. Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimers*, 62 CHI.-KENT L. REV. 199, 243 (1985).

²³ *Id.*

²⁴ Two large national auto dealers, AutoNation and Sonic Automotive were brought into Florida courts to defend class action suits for allegedly inflating the prices on extended warranties and service contracts. See William R. Levesque, *Suit Accuses Auto Dealers of Trickery on Warranties*, ST. PETERSBURG TIMES, May 10, 2002, at 6B. Dealers have also been accused of making inadequate disclosures on warranties. See *Used-Car Dealers Accused of Fraud*, ST. LOUIS POST-DISPATCH, Dec. 13, 1991, at 4C. "Bait and Switch" tactics are commonly used to lure customers into a dealership promising good deals on vehicles but then not having the vehicles available when the customer arrives—leaving the consumer with only the expensive vehicles for sale. Mark Curriden, *Buyers' Suit Says Car Dealer Used Fraud to Trap Customers*, ATLANTA J. & CONST., Apr. 11, 1992, at A3.

²⁵ AUTOMOTIVE RETAILING TODAY, SURVEY OF ATTITUDES AND PERCEPTIONS OF THE AUTOMOBILE PURCHASE EXPERIENCE AMONG THREE MAJOR GROUPS 2002 (Jan. 2003) (researched by Wirthlin Worldwide), <http://www.autoretailing.org/pdf/consumer.pdf> (last visited Feb. 26, 2005). Automotive Retailing Today is an organization that seeks to "build stronger customer relationships" by "promot[ing] a better understanding of the retail side of the automotive industry." See *Automotive Retailing Today, About ART*, <http://www.autoretailing.org/about.htm> (last visited Feb. 26, 2005).

Many consumers have bad experiences when purchasing a car and then do not trust car salespeople after those experiences.²⁶ Consumers cannot know the true nature of a car purchase from negotiations through the final signing unless they have already gone through the whole experience once and have been harmed. The consumer's lack of information before making that initial purchase adds to the bargaining power disadvantage that consumers face when matched against experienced car dealers.²⁷

B. *Bargaining Problems Inherent in a Vehicle Purchase*

Professor Stephen Plass outlines a typical transaction involving the purchase of a used car.²⁸ Plass describes a young woman looking for an inexpensive car for transportation to work.²⁹ The dealer pressures her into acting quickly and presents her with complex paperwork that includes expensive options that were never expressly accepted by her.³⁰ Some of these extras included various types of insurance and expensive financing despite her good credit rating.³¹ Because the

²⁶ See, e.g., Christopher A. Sawyer, *Losing the Youth Market*, AUTOMOTIVE DESIGN & PRODUCTION, Apr. 1, 2003, at 56. The author expresses surprise at the reaction of a young woman to American car dealers who have caused her to claim that she will never buy another domestic car. The woman stated in the article that “[a]ll they cared about was the sale,” when referring to the dealers. *Id.* Consumers like this woman may be more wary the second time they purchase a vehicle, but they still deserve protection the first time around, when they are not likely to be as cautious.

²⁷ Bargaining power disparity has been expressly recognized in other similar circumstances, including the disadvantage that employees face when dealing with their employers regarding union membership. “In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract.” See CAL. LAB. CODE § 923 (West 1994).

²⁸ Stephen A. Plass, *Bargain Avoidance in a Competitive Bargain Market: The Car Sales Conundrum*, 2 WYO. L. REV. 1, 10–11 (2002).

²⁹ *Id.*

³⁰ *Id.* An example of a typical contract for the sale of an automobile shows that there is a lot of space for dealer add-ons on the front of the contract and very little space for the disclaimer of warranties that can be found on the reverse side of the document. E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, SELECTIONS FOR CONTRACTS 258–59 (2001). Although the dealer's registration fee looks variable because a maximum is written in the contract, that maximum amount is already included in the price, so that term probably is not negotiated often. See *id.* “Scotch-guarding” the interior of cars formerly was a popular dealer add-on, but a more common option today is “window-etching,” an identifying feature on the vehicle that is supposedly helpful in case it is stolen. See Bruce Mohl, *Lawsuit Takes on Boch Glass-Etching Fee*, BOSTON GLOBE, Nov. 3, 2002, at E3. In this situation, the price for the etching was included in the purchase price without the consent of the buyer. *Id.*

³¹ Plass, *supra* note 28, at 10–11. This buyer could probably have obtained better financing if she would have procured it on her own from another lending institution outside of

dealer offered her a significant trade-in price for her old vehicle, which she valued very lowly, she trusted him and signed the rest of the paperwork without asking any questions.³² She did not even have enough time to read through the lengthy documents because the dealer was pressuring her so much.³³ This may have been a strategy by the salesman to complete the sale quickly, freeing him to make another deal with another customer. This is a common scenario that involves very little actual bargaining.³⁴ Professor Plass also mentions that many of these consumers will probably just pay the extra charges and treat it as a "bad experience."³⁵ These consumers may not seek legal relief because they do not know how they are protected by the law and may not even know about the freedom to bargain over price that is inherent in automobile purchases.³⁶

Sellers have also been alleged to purposely include contract terms that they know are unenforceable in commercial transactions.³⁷ The cost-benefit analysis that the seller performs always results in the choice to include the unenforceable terms because the costs of getting caught are slight and the possible benefits are substantial.³⁸ This is a result of the imperfect information that leaves the consumer at the mercy of accepting the terms of the seller. When the seller includes the unenforceable terms, the consumer is left with the impression that each term is legally enforceable; the lack of information prohibits the consumer from knowing the legal environment as well as the seller does. Although a simple solution to this problem is self-policing by the seller, the general public does not trust car dealers enough to rely on dealers regulating themselves.³⁹ The general

the car dealership. She may have been under the impression that no sale could be completed that day if she wanted to finance the purchase through her own bank.

³² *Id.* She did not believe that her car was worth very much, although this conclusion was probably not the result of a significant comparison study of the used car valuation guides that are available to consumers.

³³ *Id.*

³⁴ Plass observes that "no bargaining took place at any level on any issue." *Id.* at 11.

³⁵ *Id.* Consumers also may be unwilling to pursue litigation if they perceive its value to be low because it is expensive and there is not a high probability of success. Many dealer add-ons are costly, but not enough to justify the assistance of more costly attorneys.

³⁶ *Id.* at 20.

³⁷ See Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. CIN. L. REV. 845, 845 (1988). Professor Kuklin argues that these types of transactions are inefficient and need to be regulated through a fashioning of remedies beyond simple damages. *Id.* at 861-70.

³⁸ *Id.* at 862.

³⁹ A few car dealers are significantly changing their businesses in response to this problem. In addition to this, many dealerships are changing their images in hopes of abandoning the negative stereotype and breeding consumer trust. See Jim Witschger, *Our Customers—Our Partners; Many Companies Provide Thoughtful, Helpful Support Staffs*, AM. SALESMAN, July 1, 2003, at 8 (describing this phenomenon in the context of arguing that it should be extended to software sales). But the market demand from consumers is not strong

structure and common dealings that occur in a car purchase account for some of the bargaining problems, although there are other factors that aid the dealer in its efforts to maximize profits.

C. Other Circumstances that Account for the Bargaining Power Disparity

Many American consumers do not have the general level of literacy that is required to be able to both read and understand the mass of financial and legal paperwork that is presented to them at the car dealership. A recent article examines the results of the U.S. Department of Education National Adult Literacy Survey ("NALS"), which was completed in 1992 at the insistence of Congress after the passage of the 1991 National Literacy Act.⁴⁰ The authors of the article found that as many as 96% of American adults cannot fully understand credit cost information presented to them in numerous documents.⁴¹ Many of these documents pertain to highly complex financing information, including interest rates and down payments that are commonly found in different parts of the mass of information.⁴² This requires consumers to locate and transfer information from one document to another mentally in order to fully understand what their obligations are.⁴³ This amount of sophistication is much greater than the general ability to read and write.⁴⁴ Because of these difficulties, it is unclear to what extent consumers are able to assent to the terms of a contract by agreeing to sign it.⁴⁵ Dealers, who are much more experienced in using complicated forms and

enough to force all dealers to comply. Furthermore, changing a dealership's image does not necessarily prevent the dealer from adding unenforceable terms to sales contracts. The practice of adding illegal terms may not yield to the same market forces that cause image changes among some dealers.

⁴⁰ Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 235 (2002).

⁴¹ *Id.* at 238. The NALS study was broken up into five different levels of difficulty for the subjects. Understanding a typical car transaction would fall into the most difficult level (Level V), and the study found that only around 3% of the subjects had attained this high level of literacy. *Id.* at 236–38. One could infer that only this percentage of the subjects in the study would be able to fully comprehend the terms of the typical vehicle purchase.

⁴² *Id.* at 237–38.

⁴³ Professors White and Mansfield note that "consumers need a high level of quantitative literacy in order to understand and evaluate terms of loan transactions." *Id.* at 240.

⁴⁴ *Id.*

⁴⁵ *Id.* at 250–51. White and Mansfield argue that courts do not consider this consumer defense—they would rather hear arguments relating to unconscionability, fraud, or public policy exceptions to enforcement. *Id.* Courts have also found reasonable people not to have the level of intelligence to understand some other kinds of complicated documents. For example, employee manuals that are distributed by a firm to explain employment conditions have been found to be confusing to employees. See *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257,

calculations, are in a far superior bargaining position as compared to the average consumer, who does not have a high enough level of literacy to understand the contract after dealing with it for only a short time.

Although problems involving general American adult literacy are serious, an equally severe situation is that of Latin consumers in America who cannot speak or read English entering into commercial transactions with contracts that are written in English. These Spanish-speaking consumers may be more susceptible to fraud in their commercial dealings if they are enticed into trusting salespeople and signing contracts without knowing what they read (assuming that the contracts are written entirely in English). In 2002, the Hispanic population in the United States was 37.4 million people, or 13.3% of the American population.⁴⁶ In 2000, only about half of the total number of Spanish-speakers was reported to speak English "very well."⁴⁷ Consumers need to be fluent in English in order to understand and bargain over complicated matters involving financing and service contracts at the dealership.⁴⁸ Because of the general rule of English-only in American sales dealings and the lack of regulations that require translation, there are many cases where Spanish-speaking people have been harmed by car dealers.⁴⁹ These consumers are especially likely to be preyed upon by car dealers because of their lack of English language education.

Apart from issues about literacy or language, there are also serious problems of possible racial discrimination against African-American car buyers. An experiment conducted by Professor Ayres in Chicago had some troubling results because it showed significant discrimination in car sales to minority consumers.⁵⁰

1266 (N.J. 1985) ("Many of these workers undoubtedly know little about contracts, and many probably would be unable to analyze the language and terms of the manual.")

⁴⁶ U.S. CENSUS BUREAU REPORT, *THE HISPANIC POPULATION IN THE UNITED STATES: MARCH 2002*, at 1–2 (June 2003), available at <http://www.census.gov/prod/2003pubs/p20-545.pdf> (last visited March 2, 2005).

⁴⁷ U.S. CENSUS BUREAU REPORT, *LANGUAGE USE AND ENGLISH-SPEAKING ABILITY: 2000*, at 2–3 (Oct. 2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf> (last visited March 2, 2005).

⁴⁸ See *supra* note 41 and accompanying text.

⁴⁹ See Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027, 1034–36 (1996). Professor Bender cites numerous examples of Latin consumers experiencing problems relating to buying cars. *Id.* One dealer was accused of using Spanish-speaking employees to entice immigrant customers for their business and another misrepresented the implications of an "as is" disclaimer. *Id.*

⁵⁰ For the results of this upsetting study, see Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 827–41 (1991). The study is particularly troubling because car dealers are reported to use sexist and racist language in the transactions. *Id.* at 846. see also Mary Flowers Boyce, *Discriminating Dealers? Analysis of Reports That Automobile Dealers Give Better Deals to Whites Than Blacks*, AUTO AGE, May

Black females were found to pay, on average, over three times the mark-up that white males were forced to pay by the dealers.⁵¹ Black men, although they paid less than black women, were still forced to pay more than twice of what white men had to pay.⁵² The study also showed how much more reluctant dealers were to share information about vehicle costs with minority buyers. While 47% of white males were given a figure on vehicle costs, only 25% of black males were given a figure, and not a single black female was given any cost information.⁵³ The price differential that minority buyers faced may have been a result, in part, of the decrease in bargaining power that these minority consumers experienced because of the limited information that the car dealers would offer to them.⁵⁴ The most appropriate explanation for the differences in treatment is revenue-based.⁵⁵ The dealers were able to distinguish between consumers based on their race and sex to determine which purchasers were more likely to be willing to pay more, allowing dealers to price discriminate.⁵⁶ It is imperative to consider the needs of these minority consumers who are most susceptible to seller abuse when examining the scope of legal relief that is available in the American marketplace.

III. LEGAL RELIEF

This Note relates most closely to the problems involving consumers' knowledge of the UCC and the warranty protection that it provides. There are also numerous federal and state laws in addition to the UCC that pertain to car transactions. Courts have also added their gloss to the legal framework by interpreting the applicable laws in particular situations. Unfortunately, there is

1991, at 12; *Deceptive New-Car Ads, Unfair Practices Get Lots of Mileage at Year's End Fraud*, L.A. TIMES, Dec. 5, 1993, at BB2.

⁵¹ Ayres, *supra* note 50, at 828. Black females faced a mark-up of \$1237, which is more than three times the amount that white males faced, \$362. *Id.*

⁵² *Id.* The average dealer mark-up when dealing with a black male was \$783, as opposed to \$362 for a white male. *Id.*

⁵³ *Id.* at 836, tbl.5.

⁵⁴ This proposition is undermined by the fact that the figures represented as the dealer's cost were inflated substantially. *See id.* at 836.

⁵⁵ *Id.* at 847.

⁵⁶ Price discrimination is the process of segmenting the population in terms of who is willing to pay the highest for the goods offered. Because of the variance in the prices of cars for different people, dealers can pick out the consumers who are willing to pay the most and force them into paying more than other consumers. Dealers may have determined that black females, especially, are willing to pay more than white males possibly because of their inability to gain access to information about the purchase. *See id.* at 848. Professor Ayres also states that "[t]he process of retail car negotiations becomes even more problematic when traditionally disadvantaged members of our society effectively pay a bargaining tax whenever they purchase a new car." *Id.* at 872.

some overlap among federal and state laws that can become confusing when read together in an attempt at harmonization.⁵⁷

A. State Consumer Protection Problems

The UCC has been adopted into the laws of each state, but because the UCC is a model act, states are free to modify the provisions however they see fit. A recent revision to the UCC has been approved, although it probably will not place the consumer in a much better bargaining position.⁵⁸ The UCC codification is normally complemented by lemon laws, unfair and deceptive acts and practices (“UDAP”) laws, and other miscellaneous provisions.

1. The UCC and its Inherent Problems

The applicable part of the UCC to this Note is Article 2 because it deals with the sale of goods.⁵⁹ Many consumers probably do not even know what the UCC is, or how they are protected by it, for that matter. Even if consumers did know about the amount of legal protection that is afforded to them, there are several factors that make the protection illusory.

There is a substantial amount of warranty protection available to consumers in the UCC. Warranties protect the expectations of buyers in sales transactions by allocating the risk of product non-conformance (to expectations) between the parties.⁶⁰ Warranties of quality⁶¹ come in one of two varieties, express or

⁵⁷ “One looking for statutory provisions protecting consumers from abuses in consumer sales transactions might as well use a kaleidoscope as a telescope or a microscope.” Donald F. Clifford, Jr., *Non-UCC Statutory Provisions Affecting Warranty Disclaimers and Remedies in Sales of Goods*, 71 N.C. L. REV. 1011, 1016 (1993).

⁵⁸ Although the most recent revisions (the 2003 Amendments) have been approved by the drafting bodies, the states have not yet incorporated these provisions into their respective statutory codes. See *infra* note 103 and accompanying text. The 1999 Amendments are the latest changes that have been adopted by the states in large part, and that version of the UCC is cited when referring to the Code as it exists today in many states. Each citation to the most recently revised UCC is specifically noted as the “amended 2003” version.

⁵⁹ U.C.C. § 2-102 (1999). Article 2 is divided into numerous specific sections that are identified as “§ 2-314,” for example. This identifies section 314 of Article 2.

⁶⁰ DOUGLAS J. WHALEY, *WARRANTIES AND THE PRACTITIONER* 9 (1981). Changes in prices occur in commercial transactions according to the risk-shifting that takes place between parties in the bargaining process. Professor Whaley analogizes warranties to insurance that must be paid for by consumers. Professor Whaley also describes a brief history of the use of warranties and dispels notions that *caveat emptor*, or “buyer beware,” ruled ever since the beginning of civilization. *Id.* at 5–8.

⁶¹ Warranties of quality are different from warranties of title, which are also provided for in the UCC in § 2-312. Warranties of title bind the seller to the affirmation that there are no security interests on the goods that are unknown to the consumer and that there is no patent

implied.⁶² Express warranties are actually communicated in bargaining for the contract and result in the creation of expectations to the buyer from the representations of the seller.⁶³ These warranties must “relate to the goods” and be a part of the “basis of the bargain.”⁶⁴ These requirements normally mean that the representation by the seller (either verbal or written) amounts to an express warranty only if the representation might have played a role in the decision of the consumer to buy.⁶⁵ The reasonable expectations of the buyer are considered when determining whether or not the representations made by the seller played a role in the decision to purchase.⁶⁶

Implied warranties are included in sales contracts unless the buyer specifically excludes them through the methods outlined in the UCC.⁶⁷ The inclusion of an implied warranty in a sales contract is also independent of the seller’s actual intent.⁶⁸ Unlike express warranties, an implied warranty attaches to the purchase regardless of what the seller represents in the purchase

infringement from the sale. See DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON SALES, LEASES, AND LICENSES 77–79 (1999) [hereinafter MATERIALS]. This Note focuses most specifically on the ability of sellers to disclaim implied warranties of quality in the sales of used cars.

⁶² *Id.* at 79.

⁶³ *Id.* at 79–80.

⁶⁴ *Id.* at 80. The “basis of the bargain” in the UCC replaced the Uniform Sales Act provision that required a buyer to prove reliance. See U.C.C. § 2-313 (1999).

⁶⁵ MATERIALS, *supra* note 61, at 80. The representations need to have some substance to them to qualify as more than just mere “puffing,” a term used to describe common representations by salespeople that are generally vague statements about certain product features such as “this car is a real beauty!” Puffing does not amount to an express warranty under normal circumstances because it is merely a subjective assessment by the seller of some aspect of the goods. It has been pointed out that some courts consider statements to the effect that the product is “first class” or “A-1” as express warranties, and not puffing. See Charles Pierson, Comment, *Does “Puff” Create an Express Warranty of Merchantability? Where the Hornbooks Go Wrong*, 36 DUQ. L. REV. 887, 891–92 (1998). The author states that the courts in these cases examined the purchaser’s reliance and the seller’s superior knowledge in making their decisions. Sellers need to be careful about representations that describe the goods because those, however informal, probably amount to warranties. Specific language or other formalities are generally not required under the UCC. See WHALEY, *supra* note 60, at 23.

⁶⁶ WHALEY, *supra* note 60, at 24. A representation by a car dealer that both the engine and transmission of an older used car have been completely rebuilt would probably play a role in the decision of a buyer to purchase the car and would be considered an express warranty. On the other hand, a promise to repair the car in the future probably would not count as an express warranty because it is not an “affirmation of fact or promise” relating to the quality of the product at issue. See U.C.C. § 2-313 (1999).

⁶⁷ MATERIALS, *supra* note 61, at 83. Professor Whaley describes these warranties as “children of the law.” *Id.*

⁶⁸ *Id.*

negotiations.⁶⁹ Implied warranties normally protect minimum consumer expectations of the product that they are purchasing. Minimum expectations are what a normal (reasonable) buyer would expect at the very least when making a purchase. In a typical car sale, there will be issues involving both types of warranties, and the typical used car dealer will attempt to disclaim all of them to reduce any obligation to repair or replace the vehicle in the future.⁷⁰

Two important implied warranties that apply to the purchase of cars (unless they are disclaimed, which they frequently are) are the implied warranty of merchantability contained in § 2-314,⁷¹ and the implied warranty of fitness for a particular purpose in § 2-315.⁷² These implied warranties apply to used goods as well as new ones, although the reasonable expectations of the performance of used goods is obviously less than the expectations for identical, but new, goods.⁷³ The merchantability warranty provides certain minimum standards that the product must meet. In general, this means a product must meet the normal expectations of the parties by working properly.⁷⁴

An implied warranty of fitness for a particular purpose applies to situations in which the seller represents that the product can be used for a specific purpose and the buyer relies on this representation.⁷⁵ There are three conditions that need to exist before this warranty is created.⁷⁶ First, the seller must have had reason to

⁶⁹ *Id.*

⁷⁰ The UCC generally prohibits the disclaimer of express warranties because construing affirmative language that creates warranties along with language negating those same warranties would be considered unreasonable under § 2-316(1). This Note focuses on the ability of car dealers to disclaim implied warranties, an opportunity specifically allowed under the Code. See *infra* text accompanying note 80.

There is also a problem with auto dealers who use written disclaimers in the contract but orally represent that the consumer is still protected. See Michael J. Herbert, *Toward a Unified Theory of Warranty Creation Under Articles 2 and 2A of the Uniform Commercial Code*, 1990 COLUM. BUS. L. REV. 265, 266 (1990). The problem arises when the parol evidence rule is also considered, because that rule normally prevents the inclusion of any oral evidence into a fully integrated contract when the oral representation is contrary to contract terms. U.C.C. § 2-202(b) (1999). Buyers probably will not be able to assert as evidence the fact that they were told that warranties covered the purchase under the parol evidence rule. Full integration generally means that the parties intend the writing to be a final expression of their intentions. *Id.*

⁷¹ U.C.C. § 2-314 (1999).

⁷² U.C.C. § 2-315 (1999).

⁷³ WHALEY, *supra* note 60, at 49–50.

⁷⁴ MATERIALS, *supra* note 61, at 88. Professor Whaley explains that this warranty (that the product will work) is all that the consumer really needs and posits the question, “When sellers disclaim the implied warranty of merchantability (and they often do), why do buyers not routinely complain?” *Id.* The warranty of merchantability has also been described as a promise that the goods are of at least “mediocre” quality. See Herbert, *supra* note 70, at 279.

⁷⁵ WHALEY, *supra* note 60, at 67–70.

⁷⁶ *Id.* at 67–68.

know that the buyer has a particular purpose in mind that is not included in the more general merchantability warranty scope.⁷⁷ Second, the seller must have had reason to know that the buyer is relying on the seller's representation. Third, the buyer must actually purchase in reliance on the seller's representation.⁷⁸ What the seller actually knew is of no consequence under the language of the UCC.⁷⁹

The UCC allows for these important protections to be disclaimed through the use of specific language, including the use of the phrase, "as is" in § 2-316.⁸⁰ This is the most convenient way to disclaim warranties for sellers, because other provisions make disclaimers more difficult.⁸¹ In many sales of used cars, the "as is" disclaimer strips the consumer of *all* protection because there are no express warranties offered. Although the UCC endorses this practice as sufficient to put consumers on notice that they are unprotected, it is unlikely that the average

⁷⁷ *Id.* The warranty of merchantability covers all ordinary uses of the goods. The warranty of fitness for a particular purpose may arise, in the context of vehicle purchases, where a consumer specifically asks a salesperson for a pick-up truck that will be able to transport heavy equipment great distances on a daily basis, and the seller makes a recommendation for a vehicle that the buyer ends up purchasing because of the perceived "expert" advice.

⁷⁸ *Id.* at 68.

⁷⁹ *Id.* The seller can be charged with having "reason to know" by the courts from the buyer's statements or conduct or other particulars of the transaction at issue. Another source for the creation of implied warranties is the United Nations Convention on Contracts for the International Sale of Goods. See United Nations Conference on Contracts for the Int'l Sale of Goods, Apr. 11, 1980, U.N. Doc. A/Conf.97/18, 19 I.L.M. 668 (entered into force Jan. 1, 1988) [hereinafter CISG]. As its name makes obvious, it is a body of law that applies to parties who have their places of business in different nations when these parties contract for the sale of goods. The CISG applies to international business transactions between parties from countries that are signatories to the agreement. See CISG, art.1, para.1. Article 35 provides for basic warranties that are similar to those created by the UCC. The analogue to the implied warranty of merchantability is contained in Article 35, Paragraph 2, Clause (a) and the fitness for a particular purpose warranty's analogue is found in Clause (b). CISG, art.35. Unlike the UCC, the CISG does not include any provisions that dictate how a disclaimer of warranty must be written to be effective. It therefore is probably more difficult to disclaim implied warranties in an international transaction.

⁸⁰ U.C.C. § 2-316(3)(a) (1999). UCC § 2-316 contains the requirements for a seller who chooses to attempt a disclaimer of implied warranties. Subsection (3)(a) lists the "language that in common understanding" makes it plain to the buyer that there are no warranties. "[W]ith all faults" can also be used as an equivalent to "as is." Subsection (3)(b) removes the implied warranty if a buyer examines the goods fully or refuses a chance to examine them if the defects could have been discovered with a reasonable examination. Subsection (3)(c) provides for modification of implied warranties through course of dealing, course of performance, or trade usage.

⁸¹ U.C.C. § 2-316(2) (1999). This provision mandates that a disclaimer of the warranty of merchantability must specifically mention the warranty and be conspicuous if written. Excluding warranties of fitness must be in writing and conspicuous to be effective. *Id.*

consumer knows anything about implied warranties or even what the UCC is and how it protects them.⁸²

The UCC has been characterized as providing “gap-fillers” that are implied in the contract in the event that the parties do not deal with a particular situation.⁸³ Although dealers have not specifically negotiated the disclaimer with buyers in purchases, dealers are allowed to disclaim warranties because of the gap-filling provisions of the UCC. It has been argued that this practice defeats some reasonable expectations of consumers, and that the UCC’s requirements should be changed to protect consumers from unfair surprise.⁸⁴

States have taken different approaches when implementing the UCC and have acted to protect consumers beyond what is required by the UCC, most notably when implementing § 2-316. State legislatures commonly make subtle changes to specific UCC provisions, and this is expected because the UCC is only a model for state laws and not a mandate to the states.⁸⁵ The District of Columbia, Maine, Massachusetts, and West Virginia have a complete statutory ban on warranty disclaimers in place because they all have changed the provisions of § 2-316.⁸⁶ Any attempt by a seller of consumer goods, including both new and used cars, to disclaim implied warranties is unenforceable in these jurisdictions. Although “as is” clauses are enforceable under the model § 2-316, they are not

⁸² See Mann & Holdych, *supra* note 16, at 13. Professors Mann and Holdych also imply that this is not the case with all consumers, as evidenced by the fact that used car dealers still offer warranties and service contracts. These warranties are offered without any state mandate, so the consumers must be aware that they need some sort of protection. Used car buyers also tend to “shop around” more than new car buyers and this competition factor may also explain why warranties are offered. For a discussion of how consumers force the used car market to adjust to their needs, see *id.* at 21–22.

⁸³ *Id.* at 10.

⁸⁴ Yvonne W. Rosmarin, *The Revision of Article 2 of the Uniform Commercial Code: Consumers-R-Us: A Reality in the U.C.C. Article 2 Revision Process*, 35 WM. & MARY L. REV. 1593, 1597 (1994). As Rosmarin stated: “Disclaimer of implied warranties, especially of the implied warranty of merchantability, is one of the most important and needed areas of revision in Article 2.” *Id.* at 1609–10.

⁸⁵ See *supra* note 13.

⁸⁶ D.C. CODE ANN. § 28:2-316.01 (2001); ME. REV. STAT. ANN. tit. 11, § 2-316(5) (West 1995 & Supp. 2003); MASS. ANN. LAWS ch. 106, § 2-316A (Law. Co-op 1998); W. VA. CODE ANN. § 46A-6-107 (Michie 1999 & Supp. 2003). A compilation and analysis of most of the state law modifications of the UCC that are mentioned in this Note can be found in Clifford, *supra* note 57, at 1019–20. Maryland generally prohibits the disclaimer of implied warranties in the sales of consumer goods. MD. CODE ANN., COM. LAW I § 2-316.1(2) (2002). However, this prohibition does not apply to the sale of used vehicles that are over six model years old with greater than 60,000 miles. *Id.* § 2-316.1(4)(a)(ii). Disclaiming implied warranties for the identified used cars is allowed but is more difficult than the model § 2-316 disclaimer because the disclaimer needs to be separately acknowledged and signed by the consumer in order for it to be effective. *Id.* § 2-316.1(4)(b)(iii). See *infra* note 180 and accompanying text.

enforceable in these few states that have modified versions of the original code.⁸⁷ Connecticut and Vermont have altered § 2-316 to prevent sellers from disclaiming implied warranties in the sale of new goods only, leaving used car buyers without any extra protection.⁸⁸ South Carolina and Washington require a disclaimer to be more specific than the original § 2-316 to be effective.⁸⁹ The changes made to the UCC by the legislatures of these states are most likely a response to inherent problems in the UCC.

Taking a closer look at the language of the implied warranties in the UCC reveals a potentially serious problem for used car buyers. The implied warranty of merchantability only applies to merchants, as they are defined in the UCC.⁹⁰ The problem with the merchantability warranty only applying to merchants is the exclusion of other consumers who commonly sell their current vehicle in the process of purchasing a new one.⁹¹ Although trading in old vehicles to the dealer for credit on a new car is commonplace, many people would prefer to try to sell their cars themselves to elicit a higher price.⁹² It has been argued that the merchant restriction for implied warranties of merchantability should be removed because it is “*caveat emptor’s* only remaining protagonist.”⁹³ It also seems to go against a basic precept of warranty law, which is to determine what the seller

⁸⁷ Clifford, *supra* note 57, at 1022.

⁸⁸ CONN. GEN. STAT. ANN. § 42A-2-316(5) (West 2002); VT. STAT. ANN. tit. 9A, § 2-316(5) (2000).

⁸⁹ South Carolina requires language to be specific and construes ambiguity against the seller. S.C. CODE ANN. § 36-2-316(2) (Law. Co-op. 2003). Washington requires particularity for an effective disclaimer. WASH. REV. CODE ANN. § 62A.2-316(4) (West 2002).

⁹⁰ See U.C.C. § 2-314 (1999). The U.C.C. defines a merchant as:

a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

Id. § 2-104(1) (1999).

This is somewhat peculiar because the implied warranty of fitness for a particular purpose applies to all sellers. See *id.* § 2-315 (1999); see also Ingrid Michelsen Hillinger, *The Merchant of Section 2-314: Who Needs Him?*, 34 HASTINGS L.J. 747, 759 (1983). Professor Hillinger points out that the damages that can be awarded for a breach by the seller of both sections lead to the same result. *Id.* at 772–73. The possibility of paying substantial damages can therefore not be an explanation for excluding non-merchants from § 2-314. *Id.*

⁹¹ Professor Hillinger provides a sample transaction where the car buyer would have no relief when purchasing from a non-merchant when the automobile did not work as expected. Hillinger, *supra* note 90, at 762–63.

⁹² See Raymond L. Flandez, *State Getting Tough on Curbside Automobile Sales*, MARYLAND GAZETTE, Dec. 4, 2002, at A2. The practice of non-merchants selling cars in driveways and mall parking lots has been dubbed “curbstoning.” *Id.*

⁹³ Hillinger, *supra* note 90, at 808.

intended to sell.⁹⁴ A non-merchant seller most likely intends that the car for sale will work as well for the new buyer as it has worked in the past for the seller.⁹⁵ If this does not happen, there are no warranties to help the buyer get what the seller intended the buyer to have.⁹⁶

“As is” disclaimers, although endorsed by the UCC as containing a clear meaning to consumers, have actually been reduced to a “boilerplate” provision which is meaningless to consumers in most instances. Professors Goetz and Scott examine the interaction between express and implied contract terms by assuming that contracting parties try to minimize the chance that their final expression will be defective.⁹⁷ Parties initially must bear the costs of trial-and-error and use different contract formulations until they find a framework that protects the expectations of their agreement.⁹⁸ After time, other parties use these same, commonly-accepted terms until they become boilerplate and are contained in many different transactions.⁹⁹ Other parties use these same “pre-formulations” that import implied terms into the contract because they save costs by not having to negotiate each provision individually.¹⁰⁰ The problem is that these pre-formulations eventually lose their meaning because the parties currently using them are so far removed from the parties that actually understood and developed the terms.¹⁰¹ The phrase “as is” may have once been understood and developed by parties in commercial transactions, but car buyers today do not have that same ability to bargain and implement contract specifics.¹⁰²

⁹⁴ *Id.* at 761.

⁹⁵ *Id.* at 762–63.

⁹⁶ *Id.*

⁹⁷ Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 272 (1985).

⁹⁸ *Id.* at 278.

⁹⁹ *Id.* at 288–89.

¹⁰⁰ *Id.* at 278. (“For most parties, such implied terms are not only *cheaper*, but they are also *better* than do-it-yourself ones.”). The authors point out a problem with this phenomenon being that it chills the expression of newer, possibly more effective pre-formulations because parties no longer waste resources in trial-and-error practice. *Id.* at 289.

¹⁰¹ *Id.* at 288–89.

¹⁰² Professor Phillips asserts that consumers do not read warranty disclaimers because they are more concerned with other aspects of the car, like the price and included features. Sellers also “are not in the habit” of bringing the clause to the attention of consumers and explaining it to them. Phillips, *supra* note 22, at 242–43. “[T]he consumer’s main concern is the swift acquisition of a highly desired product.” *Id.* at 244. It is also unlikely that typical consumers would be able to fully understand what they are giving up by signing the sales contract because there is so much unfamiliar legal terminology. *Id.* at 243.

2. *The Latest Revisions to Article 2 are Ineffective*

The American Law Institute (“ALI”) and the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) have completed a revision of a significant portion of the UCC.¹⁰³ Article 2 has been revised, but the revisions will not help place consumers on a more equal footing with car dealers with respect to bargaining power. One reason that the latest revisions do not effectively protect consumers’ rights is that the UCC was created to modernize the vast body of law that dealt with commercial transactions, not to be a set of regulatory laws for consumer protection.¹⁰⁴ Consumer representatives who were included in the drafting process of the revisions did not attempt to change the basic concept of the UCC.¹⁰⁵ These consumer advocates sought fair treatment in commercial transactions for consumers because the UCC assumes that most commercial transactions are fair when the two parties to the deal are sophisticated businesspeople.¹⁰⁶ Unfortunately, many commercial transactions now involve consumers who are significantly less sophisticated than their counterparts—the sellers.¹⁰⁷ The changes espoused in this Note follow along the lines of the approach taken by the consumer representatives in the drafting party.

A specific change was made in the revision to § 2-316, requiring that, to be effective, an “as is” disclaimer of implied warranties “in a consumer contract evidenced by a record [must be] set forth conspicuously in the record.”¹⁰⁸ This is important because consumers may not be able to read disclaimer language that is buried in dense, small text in the middle of the boilerplate section of the contract. It is also possible that the boilerplate section will be printed on the reverse side of the invoice. Conspicuousness will require sellers to remove their disclaimers from this position in the contract. This is a valuable protection for consumers, but it is

¹⁰³ The American Bar Association recently approved the revision at the mid-year meeting of its House of Delegates. See Uniform Law Commissioners, Announcements, *ABA Approves Six NCCUSL Acts*, Feb. 9, 2004, at <http://www.nccusl.org/nccusl/DesktopModules/NewsDisplay.aspx?ItemID=91> (last visited Feb. 26, 2005). This article notes that the original version of Article 2 was promulgated in 1951, and that the revisions under review have been going on for decades. Although the revision has been completed, no legally effective change has been made because no state has adopted any of the most recent (2003) revisions.

¹⁰⁴ Some of the purposes of the UCC are to “simplify, clarify, and modernize” commercial law and to make the law uniform among various jurisdictions. See U.C.C. § 1-103(a)(1)–(3) (1999). “[T]he UCC took a hands-off approach to consumer sales problems.” Clifford, *supra* note 57, at 1016.

¹⁰⁵ Rosmarin, *supra* note 84, at 1595. Ms. Rosmarin is an attorney who served as an official observer to the Article 2 Drafting Committee.

¹⁰⁶ *Id.* at 1595–56.

¹⁰⁷ *Id.*

¹⁰⁸ U.C.C. § 2-316(3)(a) (amended 2003).

unlikely that this provision will increase the amount of bargaining that consumers will engage in with the dealer. It does not necessarily follow that a consumer who has noticed a conspicuous disclaimer understands it.¹⁰⁹ Like the FTC Used Car Rule,¹¹⁰ this new provision assumes that consumers know their rights under the UCC.¹¹¹ Unfortunately, they do not, and revisions requiring more basic information would be more effective to arm consumers with the information that they need to know to bargain effectively. The UCC needs to take a broader approach to consumer protection because state and federal laws are particularly inadequate with respect to automobile transactions. Changes would be most effective to UCC sections as opposed to existing federal and state laws that are ineffective.¹¹²

3. *Non-UCC Provisions and Their Problems*

Other state laws that have been passed to protect consumers do not have the potential to spark the nationwide effects that a change in the UCC could have. State lemon laws are common, but these laws only apply after the transaction has been made and the consumer has been injured.¹¹³ Ohio's lemon law¹¹⁴ allows a consumer to obtain a refund of the purchase price for a new vehicle if a manufacturer is unable to repair a serious defect in the vehicle after a reasonable number of attempts.¹¹⁵ The relief can only be granted after the contract has been consummated and the consumer has been injured. The effectiveness of state

¹⁰⁹ Rosmarin, *supra* note 84, at 1597. "In many cases, a giant 'AS IS' statement or a disclaimer clause in bold face and all capital letters disclaiming the . . . implied warranties may be unfair no matter how large or bold the words are." *Id.*

¹¹⁰ See *infra* notes 134–40 and accompanying text.

¹¹¹ See *id.*

¹¹² Rosmarin, *supra* note 84, at 1602 ("[The NCCUSL's] power and influence, along with its credibility and that of the ALI, could give a revised Article 2 containing consumer provisions a strong chance for success.").

¹¹³ New car lemon laws have now been passed in all fifty states and the District of Columbia. The National Consumer Law Center lists each of these laws, organized by state. JONATHAN SHELDON & CAROLYN L. CARTER, NATIONAL CONSUMER LAW CENTER, CONSUMER WARRANTY LAW 771 app. F (2d ed. 2001) [hereinafter WARRANTY MANUAL]. There are also compilations of service contract laws and forms that can be used to file a lawsuit for breach of warranty against a car manufacturer. See *id.* at 791 app. G, 839 app. K.

¹¹⁴ OHIO REV. CODE ANN. §§ 1345.71–1345.78 (West 2003) (Nonconforming New Motor Vehicle Law).

¹¹⁵ OHIO REV. CODE ANN. § 1345.72 (West 2003). A consumer is entitled to this remedy if the same defect in the vehicle has been subject to three or more repair attempts in one year, or if the vehicle has been out of service being repaired for thirty days or more in a year. OHIO REV. CODE ANN. § 1345.73 (West 2003).

lemon laws has been disputed by commentators since the inception of the laws.¹¹⁶ Lemon laws also commonly only apply to new cars, affording no help to a used car purchaser.

Unfair and Deceptive Acts and Practices (“UDAP”) statutes are also common and can provide a remedy to consumers who are victims of fraudulent dealings.¹¹⁷ Like the state lemon laws, these laws also work long after the completion of the contract, meaning that the consumer has already been victimized. UDAP laws were initially very popular because they provided an easier cause of action to prove for the consumer than common law fraud.¹¹⁸ Although these laws are very popular, legislation needs to be aimed at helping the consumers to bargain *before* signing the contract, instead of providing relief *after* they have already been outmatched in the bargaining context by the car dealers.

Because of differing amounts of consumer protection between states, the price of a vehicle does not necessarily reflect the risks that are involved regarding legal action.¹¹⁹ Although the UCC has been adopted by all fifty states in some form, there are some major differences between states. There are also a variety of model consumer protection acts, which adds to the disparity.¹²⁰ Different states

¹¹⁶ Some have argued that the passage of state lemon laws may cause manufacturers to improve the quality of their products in the future. See Julian B. Bell III, Comment, *Ohio's Lemon Law: Ohio Joins the Rest of the Nation in Waging War Against the Automobile Limited Warranty*, 57 U. CIN. L. REV. 1015, 1034 (1989). Others have argued that lemon laws actually benefit manufacturers by increasing consumer confidence and ultimately prices on cars without costing the manufacturers much in profits because they are not very helpful to consumers. See Julie A. Vergeront, *A Sour Note: A Look at the Minnesota Lemon Law*, 68 MINN. L. REV. 846, 847 (1984).

¹¹⁷ See generally Anthony Paul Dunbar, Comment, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427 (1984) (providing an in-depth analysis of UDAP statutes in each of the fifty states). A violation of Maine's altered § 2-316 also counts as a violation of the state UDAP law. ME. REV. STAT. ANN. tit. 11, § 2-316(5)(a) (West 2003); see also *supra* note 86 and accompanying text.

¹¹⁸ Diana Curry, Note, *The Effect of an "As Is" Clause on a DTPA Cause of Action*, 54 BAYLOR L. REV. 239, 240 (2002) (DTPA is an acronym that is basically synonymous with UDAP.). Proving that the seller had *scienter*, or knowledge of the deception, and a specific intent to deceive are two elements that make a successful cause of action for fraud difficult to maintain. See Robert G. Byrd, *Misrepresentation in North Carolina*, 70 N.C. L. REV. 323, 326-27 (1992).

¹¹⁹ David A. Rice, *Product Quality Laws and the Economics of Federalism*, 65 B.U. L. REV. 1, 7-8 (1985). Professor Rice points out that the chance that the seller will have to repair or replace the product is included in the price. In a state with greater consumer protection, the cost of this chance of repair will be greater to the seller and that will be passed on to consumers by an increase in the purchase price. Because sellers cannot change the price according to which state the consumer is located in, all buyers will have to pay the same greater price. The legal action is what the purchasers in the states with enhanced protection enjoy from their state courts. Other consumers pay for, but do not enjoy the same right to legal relief.

¹²⁰ See *id.* at 4.

wrote their consumer protection laws by following the lead of different model laws, creating inconsistency between states.¹²¹ Consumers in states with less consumer protection are actually paying more than they should be, because they are unlikely to be afforded relief after the purchase. The buyers in states with more consumer protection pay the same prices as the former consumers but do not face as much risk of paying for repairs or replacement.¹²² This results in a subsidy paid by the less-protected consumers to the well-protected consumers.¹²³ Consumers in states with less protection¹²⁴ should at least be able to bargain for that illusory protection for which they are paying. Unfortunately, they cannot bargain effectively under the current system. And while federal law applies in each state, it does not address this issue directly.

B. Federal Consumer Protection Problems

Federal statutory protections are not effective at improving the consumer's ability to bargain. One source of federal protection is the Magnuson-Moss Warranty Act,¹²⁵ which was passed in 1975 in order to alleviate some problems that consumers faced in understanding warranties.¹²⁶ This Act prohibits a seller from disclaiming implied warranties if a written warranty is given or a service contract is sold along with the product.¹²⁷ Implied warranties may only be limited in duration to that of the express warranties offered with the purchase.¹²⁸ These provisions do not apply to car purchases if no written warranty is offered with the

¹²¹ *Id.*

¹²² The different consumers in different states end up paying the same price because of price discrimination laws that do not allow the seller to change the price according to the region. *Id.* at 5.

¹²³ Professor Rice stated that “[p]urchasers in states which provide consumers with a high level of legal protection are, in effect, beneficiaries of a product quality protection subsidy underwritten by consumers who receive more limited intangible legal rights and remedies.” *Id.* at 8.

¹²⁴ An example would be a state that considers an “as is” disclaimer an absolute bar on any remedy for implied warranty breaches.

¹²⁵ Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301–2312 (2000).

¹²⁶ *Ismael v. Goodman Toyota*, 417 S.E.2d 290, 293 (N.C. Ct. App. 1992). “The Act was passed in an attempt to make warranties on consumer products more understandable and enforceable and further to establish a more effective procedural mechanism for consumer claims which typically involve a small amount of damages and for which a remedy may otherwise be unavailable.” *Id.*, citing 17 AM. JUR. 2D *Consumer Product Warranty Acts* § 1 (1990).

¹²⁷ 15 U.S.C. § 2308(a) (2000).

¹²⁸ 15 U.S.C. § 2308(b) (2000). Consumers can also get attorney’s fees included in a damage award if they prevail in court. 15 U.S.C. § 2310(d)(2) (2000).

purchase.¹²⁹ Used car dealers can avoid provisions that would help used car buyers simply by not offering any written warranty protection.

Another problem with this provision is that it undermines the protection that is afforded to consumers in the total ban jurisdictions.¹³⁰ The Federal Trade Commission ("FTC") initially proposed to include a list of total ban states with the warranty limitation to inform consumers of their rights as citizens of those states.¹³¹ However, this provision was not included as a result of dealers complaining about the burden of monitoring state laws.¹³² The resulting compromise does not inform the buyer of anything, but just alerts them that the implied warranty limitation may or may not apply to them, depending on where they live.¹³³

The FTC has also promulgated regulations that were intended to force used car sellers to disclose more information to buyers.¹³⁴ Although no warranty rights are created by the FTC Used Car Rule, disclosures are required that help to notify the consumer of what warranties will accompany a purchase.¹³⁵ Disclosures are required to be prominently displayed on the window of the cars in what is called a "buyer's guide,"¹³⁶ which contains terms that are cross-referenced in the sales contract.¹³⁷ An important aspect of this Rule is the requirement that sellers define the meaning of the phrase "as is" and conspicuously mark that the car is being sold without any warranties, despite what the dealer may have represented in the negotiations.¹³⁸ This is effective to alert the consumer to the fact that they will bear all of the risk of repairing the vehicle.¹³⁹ The buyer's guide and disclosures are also required to be in Spanish for sales that are conducted in that language.¹⁴⁰

Despite the important disclosures that are required by the Rule, fundamental information about the UCC and about consumer protections are not included. Like other disclaimers, this assumes that the average consumer is aware of the

¹²⁹ 15 U.S.C. § 2309(b) (2000).

¹³⁰ Clifford, *supra* note 57, at 1054. The total ban jurisdictions consist of Maine, Massachusetts, and the District of Columbia. *See supra* note 86 and accompanying text.

¹³¹ Clifford, *supra* note 57, at 1054.

¹³² *Id.*

¹³³ *Id.* The clause reads: "Some states do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you." *Id.*

¹³⁴ Used Motor Vehicle FTC Trade Regulation Rule, 16 C.F.R. § 455 (2003).

¹³⁵ WARRANTY MANUAL, *supra* note 113, at 526.

¹³⁶ 16 C.F.R. § 455.2 (2003).

¹³⁷ *Id.* § 455.3.

¹³⁸ *Id.* § 455.2.

¹³⁹ The buyer's guide, or window sticker, needs to contain the language, "YOU WILL PAY ALL COSTS FOR ANY REPAIRS." WARRANTY MANUAL, *supra* note 113, at 696 app. D (containing a reproduction of the mandatory form required by the FTC).

¹⁴⁰ 16 C.F.R. § 455.5 (2003).

substantive warranty protection that is offered under state law. This is not true in most cases. Disclaimers need to be more basic and informative, and would be most effective by changing the UCC, because it is the source of the substantive warranty protection.¹⁴¹ Courts have interpreted the effects that federal law has on state proceedings in addition to any applicable state law.

C. Inadequate Court Protection of Consumer Rights

Litigation brought by disgruntled car buyers has been very common in many different jurisdictions in the United States. Many cases involve disputes over who should bear the cost of making repairs to the vehicle by examining what warranty protection the consumer was afforded.¹⁴² The variety of the damage to cars ranges from relatively minor inconveniences to cases where car engines have exploded or cars have caught nearby buildings on fire.¹⁴³ There has been much litigation involving car buying issues in recent years, with consumers losing out on numerous occasions.¹⁴⁴ This is because it is unrealistic to depend on courts to always take the inherent bargaining power disparity into consideration in

¹⁴¹ A change of this type was contemplated in the FTC Rule because it specifically provides that the Rule will not be in effect in a state that provides for better consumer protection upon application by a state agency. *Id.* §§ 455.5–455.6.

¹⁴² See generally *Chrysler Corp. v. Schiffer*, 736 So.2d 538 (Ala. 1999); *Ford Motor Co. v. Reed*, 465 S.W.2d 80 (Ark. 1971); *Vandermark v. Ford Motor Co.*, 391 P.2d 168 (Cal. 1964); *Web Press Serv. Corp. v. New London Motors, Inc.*, 533 A.2d 1211 (Conn. 1987); *Picker X-Ray Corp. v. General Motors Corp.*, 185 A.2d 919 (D.C. 1962); *Frank Griffin Volkswagen v. Smith*, 610 So.2d 597 (Fla. Dist. Ct. App. 1992); *Rothe v. Maloney Cadillac, Inc.*, 518 N.E.2d 1028 (Ill. 1988); *Boos v. Benson Jeep-Eagle Co., Inc.*, 717 So.2d 661 (La. Ct. App. 1998); *Denny v. Ford Motor Co.*, 662 N.E.2d 730 (N.Y. 1995); *Ismael v. Goodman Toyota*, 417 S.E.2d 290 (N.C. Ct. App. 1992); *Nationwide Ins. Co. v. General Motors Corp.*, 625 A.2d 1172 (Pa. 1993); *LaBella v. Charlie Thomas, Inc.*, 942 S.W.2d 127 (Tex. App. 1997); *Schroeder v. Fageol Motors, Inc.*, 544 P.2d 20 (Wash. 1975).

¹⁴³ A minor problem involved a leased car that stalled at an intersection and “ran a little rough.” *LaBella*, 942 S.W.2d at 130. A more serious problem involved the explosion of a truck engine because of a casting defect. *Schroeder*, 544 P.2d at 22. A tragic case involved a car that burst into flames inside the garage of the owner’s residence, resulting in total destruction of both the car and the residence. *Reid*, 465 S.W.2d at 81.

¹⁴⁴ See *Kunert v. Mission Fin. Serv. Corp.*, 1 Cal. Rptr. 3d 589 (Cal. Ct. App. 2003), *review denied*, No. S118366, 2003 Cal. LEXIS 8286 (Cal. Oct. 29, 2003) (holding that dealers may receive commissions for assigning consumer financing contracts to lenders); *Jackson v. South Holland Dodge*, 755 N.E.2d 462 (Ill. 2001) (allowing a dealer to not disclose the amount of money that they retain in a commission from a warranty sale); *DiCintio v. Daimler Chrysler Corp.*, 768 N.E.2d 1121 (N.Y. 2002), *reargument denied*, 772 N.E.2d 607 (N.Y. 2002) (finding that a car lease does not apply to the federal warranty protection afforded consumers by the Magnuson-Moss Act).

determining the outcome of a case.¹⁴⁵ A Ninth Circuit decision found Spanish-only speakers negligent for not obtaining a translation of the purchase contract.¹⁴⁶ Courts express a strong desire to protect the freedom to contract and the ability of the parties to create their own specially-tailored rights and remedies.¹⁴⁷ Courts need to recognize that the bargaining power disparity can be so severe that the terms are not bargained for and not assented to by the consumer and invalidate them in some instances.

Friedrich Kessler identifies the tendency of courts to preserve the freedom of contract in the face of potentially unfair contracts.¹⁴⁸ Kessler notes that when one party to a contract has more bargaining power than the other party, the stronger party can create a standard contract which prevents the weaker party from "shop[ping] around" for better terms.¹⁴⁹ The weaker party cannot shop around because the stronger party maintains a monopoly or because the other sellers offer the same terms.¹⁵⁰ The weaker party cannot hunt for better terms in the case of car sales because almost all dealers use the exact same clauses. These contracts are known as contracts of adhesion, or contracts that are *à prendre ou à laisser*, which is basically the French equivalent of "take it or leave it."¹⁵¹

Courts have traditionally attempted to allow parties the freedom to create their own bargains, ignoring their sense of justice or social responsibility.¹⁵² Courts that attempt to protect the integrity of freedom of contract, even in the face of socially undesirable bargains, should realize that the common law is flexible enough to accommodate change.¹⁵³ Common law tools can be used by courts to mitigate the harshness of the freedom of contract theory. Common law evolution

¹⁴⁵ *But see* *Martin v. Joseph Harris Co., Inc.*, 767 F.2d 296 (6th Cir. 1985). In that case, the court considered the bargaining power disparity between the parties as a factor in its unconscionability analysis. *Id.* at 300–01. In describing the parties to the dispute, the court went on to state "that Harris Seed is a large national producer and distributor of seed, dealing here with independent, relatively small farmers." *Id.* at 301. The Sixth Circuit was examining the effects of the implied warranty disclaimers that the seed company had used in its defective seed sales with the aggrieved farmers. *Id.* One judge concurred, revealing his personal views on contracts by noting that "I am normally loath to interfere with the contract the parties have made." *Id.* at 304 (Merritt, J., concurring).

¹⁴⁶ *Bender*, *supra* note 49, at 1038, *citing* *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282 (9th Cir. 1988).

¹⁴⁷ Judge Merritt's concurrence in *Martin* exemplifies this principle. *See supra* note 145.

¹⁴⁸ Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631 (1943).

¹⁴⁹ *Id.* at 632.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* (translation provided by author).

¹⁵² *Id.* at 637.

¹⁵³ *Id.* at 638. Kessler cites the doctrine of consideration as a form of contract law that has evolved with influence from both the freedom of contract theory as well as the consumer protection theory. *Id.*

may help to prevent standard contracts from becoming “effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals.”¹⁵⁴

There are a variety of ways in which “as is” disclaimers are treated by courts in different jurisdictions. Even though the UCC seems clear in stating that this language disclaims any implied warranties (although it does not disclaim express warranties¹⁵⁵), courts have still refused to enforce its effectiveness in certain situations.¹⁵⁶ Courts have also been reluctant to enforce similar language to “as is” because it may not be as clear to the consumer as the express requirements of the UCC are supposed to be.¹⁵⁷ These cases are relatively rare because courts usually find that “as is” is sufficient to disclaim implied warranties as long as there is evidence that the consumer has assented to its inclusion.

In fact, courts will even use the disclaimer to insulate the seller from other causes of action in certain circumstances. For example, the Texas Supreme Court held that the “as is” clause in a purchase agreement acted to negate a cause of action under the state UDAP statute.¹⁵⁸ The court found no cause in fact because the buyer assumed all of the risk by agreeing to the contract with the disclaimer.¹⁵⁹ The holding was limited to the facts of the case, which involved the purchase of a building.¹⁶⁰ But despite this apparent limitation, there is still a chance that used car buyers could be denied protection of other laws because of their apparent assent to an implied warranty disclaimer.

Courts have not traditionally been willing to find warranty disclaimers unconscionable under UCC § 2-302,¹⁶¹ and there have been arguments that

¹⁵⁴ Kessler, *supra* note 148, at 640.

¹⁵⁵ See *supra* note 70.

¹⁵⁶ See Janet L. Richards, “As Is” Provisions—What Do They Really Mean?, 41 ALA. L. REV. 435 (1990). Professor Richards cites cases that fall into three different categories: (1) cases in which courts have required the provision to be conspicuous, *id.* at 452–53; (2) cases in which courts have focused on whether or not the buyer was unfairly surprised, *id.* at 457; and (3) cases in which courts have refused to allow the disclaimer of warranties that were common in the trade, *id.* at 460–61. Professor Richards espouses an approach that would allow consumers to present evidence that they did not, in fact, assent to the disclaimer by claiming unfair surprise, an argument that should appeal to courts. *Id.* at 470.

¹⁵⁷ *Id.* at 462–64.

¹⁵⁸ Curry, *supra* note 118, at 239. Ms. Curry examines Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd., 896 S.W.2d 156 (Tex. 1995) and its possible impact on future related litigation. The DTPA cause of action that Curry is referring to is the same as the UDAP statutes that are now common. See Dunbar, *supra* note 117 and accompanying text.

¹⁵⁹ Curry, *supra* note 118, at 244.

¹⁶⁰ *Id.* at 246. Curry notes that the court espoused the use of a “totality of the circumstances test” to determine the reach of the “as is” clause. *Id.*

¹⁶¹ Subsection 1 of § 2-302 states:

courts should reverse this trend.¹⁶² Unconscionability has been described as a contract that was “too hard a bargain and too one-sided an agreement to entitle the plaintiff to relief in a court of conscience.”¹⁶³ A finding of unconscionability generally requires finding both “substantive” and “procedural” unconscionability.¹⁶⁴ The substantive part requires a showing of oppressive terms against one party to the contract and the procedural part requires a showing of unfairness in the process of bargaining.¹⁶⁵ Professor Phillips advocates a “more aggressive judicial stance” to find unconscionability in implied warranty disclaimers.¹⁶⁶ He summarized numerous cases where the disclaimers involved did not reach the level of unconscionability according to the court.¹⁶⁷ For example, the Arizona Supreme Court discounted the fact that the buyer was at a bargaining power disadvantage in upholding a warranty disclaimer because it was a common practice of the seller.¹⁶⁸ Professor Mooney agrees that unconscionability is not used widely enough and has noted that “American contract decisions today tend to enhance rather than to mitigate the power of economically dominant parties.”¹⁶⁹ Although warranty disclaimers are arguably unconscionable no matter how they are used, courts are not always willing to find in the consumer’s favor. Courts may be more apt to be consumer-friendly with a clear mandate from the UCC.

IV. WHAT TO DO WITH WARRANTY DISCLAIMERS

Because the current method of disclaiming warranties is not sufficient to put the average consumer on notice of what she is giving up, making certain changes

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

U.C.C. § 2-302(1) (1999).

¹⁶² See generally Phillips, *supra* note 22; Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131 (1995).

¹⁶³ *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (3d Cir. 1948).

¹⁶⁴ DAWSON ET. AL., *CONTRACTS: CASES AND COMMENT* 706 (8th ed. 2003).

¹⁶⁵ See *id.*

¹⁶⁶ Phillips, *supra* note 22, at 267.

¹⁶⁷ See *id.* at 233–34.

¹⁶⁸ *Id.* at 233, citing *Seekings v. Jimmy GMC*, 638 P.2d 210 (Ariz. 1981). There have been cases where disclaimers were found to be unconscionable, such as in the case of a defective new car where the facts that the disclaimer was inconspicuous and received by the buyer after the sale were important to a New Jersey court. *Id.* at 234, citing *Zabriskie Chevrolet, Inc. v. Smith*, 240 A.2d 195 (N.J. Super. Ct. Law Div. 1968).

¹⁶⁹ Mooney, *supra* note 162, at 1206.

in the disclaimer requirements may help to alleviate the problems that are identified in this Note.¹⁷⁰ The growth of the Internet into many American homes and businesses may help to provide car purchasers with more information than they currently have.

A. Possible On-Line Help for Consumers

With the growth of technology and the resulting decrease in costs of owning a computer with access to the internet, consumers are able to access a variety of legal information from state-sponsored sources and other private sources. An example of how Americans are becoming more computer-savvy is the fact that fifty-one million citizens filed their taxes electronically in 2003.¹⁷¹ Today, a consumer who is accustomed to “surfing” the Internet can find information relating to any kind of legal question without substantial costs.¹⁷² Commentators have also recognized the ability of attorneys to find valuable legal research materials online.¹⁷³

Attorney General websites can also be valuable sources of information for consumers, with some listing certain consumer protection statutes, including laws applicable to car purchases such as lemon laws and UDAP statutes.¹⁷⁴ Although

¹⁷⁰ Prohibiting disclaimers altogether is an alternative to modifying the disclosure language that is required. Some judges have taken this position in an effort to influence the legislators in their state. The Texas Supreme Court refused to uphold a warranty disclaimer in the sale of vehicle lifts. *Cate v. Dover Corp.*, 790 S.W.2d 559, 562 (Tex. 1990). The concurrence is basically a plea to the legislature to repeal § 2-316 because the provision is unfair to consumers. *Id.* at 567 (Spears, J., concurring) (“If the legislature has the interests of Texas citizens at heart, it will repeal section 2-316 because, no matter how conspicuous, such disclaimers are abusive of consumers.”). This Note proposes a less drastic approach that is more likely to be considered seriously by the appropriate drafting bodies. The downfalls of the more drastic approach are considered *infra* Part IV.B.3.

¹⁷¹ Justin D. Leonard, *Cyberlawyering and the Small Business: Software Makes Hard Law (But Good Sense)*, 7 J. SMALL & EMERGING BUS. L. REV. 323, 325 (2003). The author also points out that computers are reported to be in half of all American households now. *Id.* This information is in the context of a discussion of the ability of small businesses to use on-line resources to guide them through activities that have traditionally required the assistance of counsel.

¹⁷² *Id.* at 326. Law firms are also increasing the amount of information that they post on-line for possible client-consumers. *See id.* at 339–41.

¹⁷³ *See, e.g.*, Carol A. Parker, *Practice Tips: Legal Resources on the Internet*, MICH. B.J., Mar. 2003, at 40 (explaining how Michigan attorneys can access valuable information on-line); Mark Pruner, *The Internet and the Practice of Law*, 19 PACE L. REV. 69 (1998) (examining sources of internet information and endorsing the use of various on-line resources for attorneys).

¹⁷⁴ A listing of attorney general websites for all fifty states is likely to be found by web-savvy consumers at CarBuyingTips.com. *See* <http://www.carbuyingtips.com/attorney-general.htm> (last visited Mar. 3, 2005).

these websites differ in sophistication, most of them have basic information on how to file a complaint and some have a significant amount of information relating to buying vehicles.¹⁷⁵ Official Attorney General Opinions are also found on the majority of the sites.¹⁷⁶ Some states have provided legal information that is accessible on the web with the approval of the state judiciary.¹⁷⁷ Programs such as these may be more widely used than commercial sites because consumers may be more trusting of legal information that is explicitly approved by the courts of their respective states.

B. *Specific UCC Changes to Close the Bargaining Power Gap*

Focus in legislation needs to be shifted to provisions that will help the consumer to learn about her legal situation *before* making a purchase instead of *after*. This change should cause a corresponding increase in the bargaining power of the purchaser. Legislation designed to allow for a consumer to recover after she has already purchased a vehicle does not cultivate better bargaining power for consumers during the actual purchase. This *ex post* legislation is characteristic of the lemon laws and the other state consumer laws that are very popular among consumers and championed by state Attorneys General. States could make changes to their respective commercial codes, or the ALI and NCCUSL could consider changing the lax requirements for disclaiming implied warranties that are now present in the UCC and in the latest proposed amendments that have been made to that regime.

1. *How the UCC Should Be Changed*

A more effective UCC requirement for disclaiming warranties would be to inform the consumers of their rights *ex ante*, so that they can have the benefit of that extra information during bargaining. This information is known by the dealer

¹⁷⁵ For example, the Illinois Attorney General webpage has a variety of useful information that is easy to find and well-organized, including tips for car buyers and information about consumer protection laws. There are also forms that are available in Spanish. See The Office of the Illinois Attorney General, Consumer Protection Division, at <http://www.ag.state.il.us/> (last visited Mar. 3, 2005).

¹⁷⁶ Jennifer Granholm, who served as Michigan's Attorney General from 1998–2002, was dedicated to using plain language in her opinions because of her recognition that a substantial number of laypeople need to understand the information that those opinions contained. See Eric J. Eggen et al., *Plain English in the Department of the Attorney General*, MICH. B.J., Jan. 2000, at 48. Hopefully, Attorneys General can follow the lead of Granholm and be just as dedicated to facilitating understanding as was she.

¹⁷⁷ The Arizona Supreme Court introduced an interactive system that provided information and complete legal documents for citizens. Leonard, *supra* note 171, at 335–36. The author also mentions a system in Oregon that would be very beneficial to car buyers because it offers legal information in different languages. *Id.* at 336–37.

and the buyer should also be able to learn of it. Most consumers probably do not know what the UCC is, let alone what implied warranties of “merchantability” and “fitness for a particular purpose” are. The majority of consumers also do not read the warranty disclaimers that are included in the sales contracts.¹⁷⁸ This requirement would not impose a burdensome, lengthy boilerplate addition to the standard purchase forms but would be a concise, conspicuous notification to the consumer. The notification would include a brief summary of the rights that consumers have under the law with a specific explanation that implied warranties protect the consumer even if they are not expressly included by the dealer. It would also specify that the consumer is giving up the ability to return the car if it does not work as it is expected to. The notification should state that any oral representations by the dealer cannot be enforced by signing an “as is” clause. The UCC should also require that dealers provide a Spanish language translation on demand from the consumer, similar to what the FTC Used Car Rule provides.¹⁷⁹ Adding a little more to the already complex and lengthy procedure should not be unduly expensive to dealers at the margin. Better disclosure language in the contract would encourage bargaining and would create better deals for car buyers.

A provision that guarantees that consumers will discuss this specific part of the contract is also necessary to ensure that the provision is bargained for in negotiations. In addition to the basic disclosure, there should be a conspicuous area for consumers to initial. The area should also contain language providing that consumers should only initial if they have actively negotiated the disclaimer of implied warranties. Dealers would not be able to enforce a disclaimer that does not contain the initials of the purchaser next to the disclaimer. This would also notify consumers that they should seek something in return for giving up their rights under the UCC. Before prospective purchasers initial the disclaimer, they can bargain for a lower price or better financing options as consideration. Provisions similar to this have been implemented by Maryland and Mississippi in their adoption of the UCC.¹⁸⁰

Another solution may be the use of state-sponsored websites. With the proliferation of access to the internet in many American households, consumers can readily learn about the laws surrounding their transactions in addition to the

¹⁷⁸ See *Cate v. Dover Corp.*, 790 S.W.2d 559, 565 (Tex. 1990).

¹⁷⁹ See *supra* note 140 and accompanying text.

¹⁸⁰ These states require any exclusion or modification of the implied warranties of merchantability and fitness for a particular purpose to be separately acknowledged with a written confirmation on the contract that is signed by the buyer. MD. CODE ANN., COM. LAW I § 2-316.1(4)(b)(iii) (1998); MISS. CODE ANN. § 75-2-315.1(3)(b)(iii) (2003). A similar provision is included in the UCC when determining whether or not an agreement is a firm offer. If the offer is drafted by the buyer and forwarded to the seller to present to the buyer as a formal offer, the agreement is not a firm offer unless the seller “separately sign[s]” the part of the agreement that contains the clause. U.C.C. § 2-205 (1999). This provision ensures that buyers have actually read and understood the terms that become part of their offers. See *id.*

“tips” that are easily accessible from numerous websites. Each state has an Attorney General website, and these sites could be a forum for consumer information along with other websites, including specialized multimedia sites endorsed by courts. The UCC could also contain a provision that mandates online informational databases with the goal of a better-educated population of consumers. States could follow the lead of Illinois,¹⁸¹ and provide helpful, detailed information to consumers on the Internet. Other jurisdictions may make an easier transition if they are motivated by a UCC provision that mandates reform.

2. *Effect on Identified Bargaining Power Problems*

This solution will also help to mitigate specific problems identified in this Note that make the bargaining disadvantage worse for consumers. Because the new disclaimer will be written in simple, easy-to-read language, consumers will not have difficulty understanding it even if their literacy skills are not highly advanced. The fact that the disclaimer is entirely contained on one page will also make it less confusing to the average consumer. Latin consumers can request a Spanish version of the disclaimer to be able to bargain just as effectively as any other consumer. The fact that they do not speak English fluently will not make them any worse off when they are bargaining with a car dealer. Improving the bargaining position of minority consumers will also potentially mitigate the effects of discrimination. A vehicle dealer may be more willing to make concessions in dealing with minority consumers who appear to be and are, in fact, well-informed.

3. *A Change Is Superior to a Total Ban on Disclaimers*

Disclaimers of implied warranties should not be banned entirely because the freedom to contract needs to be protected on both sides of the transaction. Not allowing disclaimers would result in the allocation of extra costs to sellers who would, in turn, pass them on to buyers in the form of a higher price.¹⁸² The costs would not only include the increased liability for problems with the cars, but also the costs of training the employees who deal with the consumers each day and providing for closer supervision of the sales force.¹⁸³ Buyers who are looking for a used car are more likely to be concerned with the price of the vehicle. Used car buyers may not be able to afford a new car, and any reduction in the price may be

¹⁸¹ See *supra* note 175 and accompanying text.

¹⁸² See Mann & Holdych, *supra* note 16, at 47. Professors Mann and Holdych argue that consumers will be worse off with mandatory warranty protection in all used car purchases. They state that “the ‘cure’ is worse than the ‘cold.’” *Id.* at 48.

¹⁸³ See Phillips, *supra* note 22, at 255–57.

appealing to them. If buyers can fully understand what they are giving up for this reduced price, there is no problem in enforcing disclaimers of implied warranties.

Another possible problem with a total ban on disclaimers in used car sales is the possibility that consumers will act in bad faith and take advantage of the ability to obtain relief for non-conformities.¹⁸⁴ Consumers may attempt to exploit the use of a cause of action for warranty breach when they are simply unsatisfied with the goods for other reasons.¹⁸⁵ Costly litigation may be brought by consumers attempting to reject cars that have trivial defects, forcing courts to make difficult determinations of what is required to render a car "unmerchantable" for purposes of § 2-314. The solution is to give consumers information before they enter into contracts and allow them to bargain for whatever terms they desire. With this information, car buyers can fully utilize their freedom of contract and rights to individual autonomy.

V. CONCLUSION

The current state of the law allows car dealers to deny consumers significant protections that they truly need in today's marketplace. In particular, dealers can disclaim the implied warranties of merchantability and fitness for a particular purpose without expending any effort whatsoever. Consumers are never aware of the protections that they could have been afforded had the contracts that they signed contained different language. The UCC can help consumers by requiring better informational disclosures in sales contracts where the seller attempts to disclaim implied warranties. This could be accomplished through a change in the language of § 2-316. The UCC (as opposed to federal or other state law) should be changed because it is the body of law that creates the implied warranty protection and could spark the most significant nationwide change if adopted by state legislatures.

Both the states and the automobile dealers should be interested in this service in order to decrease the amount of complaints and increase consumer confidence in this industry, creating greater sales volume. Hopefully, many of these sales will result from meaningful bargaining between car dealers and a new class of educated consumers, who are more aware of the legal environment in which they are purchasing.

¹⁸⁴ See Gregory M. Travaglio, *The UCC's Three "R's": Rejection, Revocation and (The Seller's) Right to Cure*, 53 U. CIN. L. REV. 931, 966 (1984). Professor Travaglio discusses the possibility that consumers may act in bad faith and return goods with minor defects unless the seller is given a reasonable period of time to cure the defects and make the goods conforming. *Id.*

¹⁸⁵ *Id.*

