St. Mary's Law Journal

Volume 17 | Number 1 Article 6

1-1-1985

# A New Twist for Texas Lemon Owners.

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## I. INTRODUCTION

To sixty-five percent of American families, the automobile is the most expensive single item, other than a house, they will ever purchase.[1] To fifteen percent of American families, it is the most expensive item ever purchased.[2] Since dependability is the main reason why many consumers pay a higher price for a new car,[3] it is unfortunate that consumers have far more com-

1. *See Automobile Warranty and Repair Act: Hearings on H.R. 1005 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce,* 96th Cong., 1st Sess. 15-16 (1979) (statement of Rep. Eckhardt, bill sponsor).

2. *See id.* at 15-16.

3. *See Warranty Performance Obligations: Hearings on Tex. H.B. 2211 Before the House Comm. on Transportation,* 68th Leg. (April 20, 1983). Texas consumers who testified before the Committee as to their "lemon" experiences, were outraged at the extensive problems they

plaints concerning new cars than any other product.[4]

According to consumer surveys, the reasons for such dissatisfaction include: the dealer's failure to cooperate in making warranty repairs or its inability to successfully repair,[5] and the necessity of having to return cars repeatedly before obtaining a successful repair.[6] The Federal Trade Commission (FTC) reports that of the thirty percent of consumers who have warranty problems with their car, twenty-five percent are not only dissatisfied with the final result of their grievances, but are also dissatisfied with the entire process of complaint-handling in the automobile industry.[7] In response to the frustrations of defective car owners,[8] Texas, along with many other states,[9] has passed a "lemon law"[10] providing more definitive relief for consumers.[11] While the Texas Lemon Law parallels all other states' lemon

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had with their cars in light of the fact that they specifically bought a new car to preclude such problems. *See id.*

4. *See* Pertschuk, *Consumer Automobile Problems,* 11 U.C.C. L.J. 145, 145 (1978) (statistics based on complaints received by FTC).

5. *See* Whitford, *Law and the Consumer Transaction: A Case Study of the Automobile Warranty,* 1968 WIS. L. REV. 1006, 1032 (survey conducted by *Consumer Reports* reveals dealer's failure to cooperate, and inability to successfully repair two most common consumer complaints).

6. *See id.* at 1032. According to Whitford's survey, the necessity of returning cars repeatedly for warranty repair was the most common consumer problem reported. *See id.* at 1032. The survey was conducted by the University of Wisconsin Survey Research Laboratory, and consisted of 329 recent new-car purchasers. *See id.* at 1010 n. 10.

7. *See* Pertschuk, *Consumer Automobile Problems,* 11 U.C.C. L.J. 145, 146 (1978). Of the thirty percent who have car warranty problems, thirty percent of those took over a month to get the problems resolved. *See id.* at 146. The author, former Chairman of the FTC, estimates that "in a year in which ten million new units are sold . . . nearly one million new-car buyers have serious difficulty with warranty service." *Id.* at 146.

8. *See Hearings on Tex. S.B. 1141 Before the Senate Comm. on Economic Development,* 68th Leg. 1 (side 1) (1983) (copy on file with the *St. Mary's Law Journal).* Senator Brown, bill sponsor, describing the frustrations of lemon owners, points out a condition commonly observed: people displaying signs on their cars saying that the car is a lemon, describing where it was purchased, and that the owner cannot get any recourse from the manufacturer. *See id.* at 1.

9. *See id.* at 5 (side 2) (Mr. Fondren, President of Texas Automobile Dealers Association [hereinafter cited as TADA], strong proponent of S.B. 1141, pointed out existence of strong movement of lemon laws "sweeping the country").

10. TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07 (Vernon Supp. 1985) ("Warranty Performance Obligations," unofficially known as the "lemon law"); *see also Hearings on Tex. S.B. 1141 Before the Senate Comm. on Economic Development,* 68th Leg. 2 (side 1) (1983). Mr. Fondren of TADA stated:

> Senate Bill 1141 in terms of principle substance deals with the so-called lemon law provision, a word that we in the industry don't like to use, but which is understood and recognized by the public to describe some of the frustrations that they sometimes have with vehicles that we sell to them.

*Id.* at 2.

11. *See* TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07 (Vernon Supp. 1985). Briefly

laws in that it provides car owners with substantially the same cause of action against manufacturers; it deviates, however, in the form of its warranty dispute resolution system.[12]

It is this uniqueness that provoked the recent constitutional attack of *Chrysler Corp. v. Texas Motor Vehicle Commission.* Fortunately for Texas lemon owners, the Texas Lemon Law has successfully withstood this attack.[13] This comment will discuss the development of the lemon law in Texas, and focus particularly upon the rationale for its recent constitutional attack and subsequent reinstatement.

## II. PRE-LEMON LAW METHODS OF RECOVERY IN TEXAS

After repeated attempts to have his new car repaired, the frustrated "lemon" owner, who has long since lost hope of his car ever being restored, rightfully wants a return of his purchase price or a new car.[14] The manufacturer, however, having purposefully limited the buyer's remedy to repair or to replacement of defective parts through a limited warranty, is not likely to comply with either desire.[15] Prior to the imposition of a lemon law, the

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described, the statute provides the lemon owner with a course of action directly against the automobile manufacturer, for replacement of the vehicle with one that is comparable or a refund of the purchase price when the dealer is unable to make the vehicle conform to its express warranty after a reasonable number of attempts at repair. *See id.* § 6.07(b). A reasonable number of attempts is presumed when the same defect has been subject to repair four or more times, or the car is out of service for repair thirty or more days during the express warranty term or within one year from date of original delivery, whichever is earlier. *See id.* § 6.07(d).

12. *See id.* § 6.07(e). The Texas statute is the only one of its kind that preconditions the availability of the lemon presumption upon submission to the Texas Motor Vehicle Commission for a hearing on the merits. *See id.* § 6.07(e). The Connecticut statute for example is representative of the other states' lemon laws, in that the utilization of the lemon law provisions are preconditioned upon submission to an informal dispute settlement mechanism complying with the FTC's regulations for such mechanisms at 16 C.F.R. § 703 (1984), if the manufacturer has set up such a mechanism. *See* CONN. GEN. STAT. ANN. § 42.179(i) (West 1985).

13. *Chrysler Corp. v. Texas Motor Vehicle Comm'n*, 755 F.2d 1192 (5th Cir. 1985); Telephone interview with Clyde Farrell, Assistant Attorney General, Chief of the Consumer Protection Division (May 2, 1985). An update on the present status of *Chrysler* indicates that Chrysler has filed a motion for extension in which to file their motion for rehearing. *Id.*

14. *See* Rigg, *Lemon Laws Should be Written to Ensure Broad Scope and Adequate Remedies,* 17 CLEARINGHOUSE REV. 302, 306 (1983). Most consumers who have had extensive problems with defective cars want a refund rather than a replacement vehicle since they prefer to sever the relationship with that particular manufacturer. *See id.* at 306 & n.53 (citing BERNACCHI, AUTO WARRANTY SERVICE DISSATISFACTION II (Univ. of Detroit)).

15. *See* Ventura v. Ford Motor Corp., 433 A.2d 801, 804 (N.J. 1981) (in response to lemon owner's demand for relief, dealer service manager advised owner he would have to live "with this one"); *see also* Eddy, *Effects of the Magnuson-Moss Act upon Consumer Product Warranties,* 55 N.C.L. REV. 835, 844-45 (1977) (since automobile can only be resold at consid-

Texas consumer, who had no other avenue of relief, was faced with one of two choices: litigation,[16] or if he, like many consumers, could not afford the costs of lengthy litigation, an absorption of the loss.[17] If the lemon owner decided to file a lawsuit, his possible methods of recovery included: revocation of acceptance under the Uniform Commercial Code (UCC) Section 2.608,[18] recovery of damages for breach of warranty under UCC Section 2.714(2),[19] and in Texas, recovery of additional damages under the Texas

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erably discounted price, "seller has a strong interest in precluding the buyer's revocation of acceptance and binding him instead to accept repair"); Whitford, *Law and the Consumer Transaction: A Case Study of the Automobile Warranty,* 1968 WIS. L. REV. 1006, 1038 (1968) (except for rare exceptions, automobile manufacturer will never offer new car).

16. *See* Whitford, *Law and the Consumer Transaction: A Case Study of the Automobile Warranty,* 1968 WIS. L. REV. 1006, 1039 (1968). Automobile manufacturers are not overly concerned about adverse judgments because not many warranty disputes are litigated, "and it is highly unlikely many would regardless of the attitude the manufacturers and dealers took toward warranty obligation. The expense of legal action is simply too great. . . ." *Id.* at 1039.

17. *See id.* at 1039 n.84 (every lawyer author interviewed in Wisconsin would advise client against litigation of warranty dispute due to expenses involved); *see also* Eddy, *Effects of the Magnuson-Moss Act upon Consumer Product Warranties,* 55 N.C.L. REV. 835, 869 (1977) (consumers given "run-around" become frustrated, "drop-out," and bear their losses); Note, *Incentives for Warrantor Formation of Informal Dispute Settlement Mechanisms,* 52 S. CAL. L. REV. 235, 236 (1978) (it is to warrantor's advantage to delay litigation thereby making it too costly for consumers to pursue remedy).

18. *See* TEX. BUS. & COM. CODE ANN. § 2.608 (Tex. UCC) (Vernon 1968). The text of § 2.608 reads:

> (a) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it:
>
> (1) on the reasonable assumption that the non-conformity would be cured and it has not been reasonably cured; or
>
> (2) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
>
> (b) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.
>
> (c) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

*Id.* § 2.608. U.C.C. revocation of acceptance has been the subject of many articles. *See, e.g.,* Elden, *Revocation of Acceptance: Interpretation and Application,* 8 U.C.C. L.J. 14, 16 (1975); Highsmith & Havens, *Revocation of Acceptance and the Defective Automobile: The Uniform Commercial Code to the Rescue,* 18 AM. BUS. L.J. 303, 306 (1980) (characterizes Code § 2.608 as having "been the object of considerable debate, study, argument, litigation, interpretation, and perhaps, misapplication"); Note, *Buyers Right to Revoke Acceptance Against the Manufacturer for Breach of Its Continuing Warranty of Repair or Replacement,* 7 GEO. L. REV. 711 (1973).

19. *See* TEX. BUS. & COM. CODE ANN. § 2.714 (Tex. UCC) (Vernon 1968). The text of § 2.714 reads:

> (a) Where the buyer has accepted goods and given notification (subsection (c) of Section

Deceptive Trade Practices and Consumer Protection Act.[20]

The standard express warranty offered by automobile manufacturers[21] exclusively limits the buyer's remedy upon breach of warranty[22] to repair or

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

(b) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

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

*Id.* § 2.714.

20. *See* TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon Supp. 1985). The consumer is entitled to a private cause of action upon breach of an express or implied warranty. The pertinent portion reads: "(a) A consumer may maintain an action where any of the following constitutes a producing cause of actual damages: (2) breach of an express or implied warranty." *Id.* § 17.50(a); *see also* Elias, *The DTPA: The All-Encompassing Buyer Remedy in Texas,* 43 TEX. B.J. 745, 747 (1980) (for more in-depth treatment of Texas DTPA).

21. *See* Note, *Buyer's Right to Revoke Acceptance Against the Manufacturer for Breach of Its Continuing Warranty of Repair or Replacement,* 7 GEO. L. REV. 711, 712 & n.2 (1983) (standard manufacturer's warranty originally developed by Automobile Manufacturer's Association has been adopted by all major manufacturers and dealers). An example of the standard manufacturer's new car limited warranty in pertinent part reads:

New Vehicle Limited Warranty

Ford Motor Company warrants that your selling Dealer will repair, replace, or adjust parts, except tires in 1984 Ford Motor Company cars and light trucks, found to be defective in factory materials or workmanship made or supplied by Ford for the periods described below. Any Ford or Lincoln-Mercury dealer may perform the repairs if you have moved, are traveling or need emergency service . . . The entire vehicle, except tires, is covered for 12 months or 12,000 miles, whichever occurs earlier . . . (At bottom of pamphlet) Ford Motor Company does not authorize any person to create for it any other obligation or liability in connection with these vehicles. TO THE EXTENT ALLOWED BY LAW, ANY IMPLIED WARRANTY OR MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE APPLICABLE TO THESE VEHICLES IS LIMITED IN DURATION TO THE DURATION OF THESE WARRANTIES. NEITHER FORD MOTOR COMPANY NOR THE SELLING DEALER SHALL BE LIABLE FOR LOSS OF TIME, INCONVENIENCE, COMMERCIAL LOSS OR CONSEQUENTIAL DAMAGES. (Bold print included in warranty).

Ford Motor Corp., Ford Warranty Information (1984).

22. *See* Murray v. Holiday Rambler, Inc., 265 N.W.2d 513, 517-18 (Wis. 1978). The court clarified the often confused distinction between a limitation of warranties and a limitation of remedies: "A disclaimer of warranties limits the seller's liability by reducing the number of circumstances in breach of the contract; it precludes the existence of a cause of action. A limitation of remedies, on the other hand, restricts the remedies available to the buyer once a breach is established." *Id.* at 517-18; *see also* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 12-11 at 471-72 (2d ed. 1980) (distinguishes between warranty disclaimers and remedy limitations). As applied to the automobile manufacturer's standard warranty, the warranty is that the vehicle will be free of defect in factory materials and work-

replacement of defective parts[23] and effectively disclaims all other warranties[24] and remedies.[25] To successfully challenge the limited remedy of repair or replacement in court, the buyer must first show that circumstances have caused the remedy to "fail of its essential purpose" under UCC Section 2.719.[26] Although Texas cases on this issue are few, Texas courts have tradi-

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manship for the warranty period; breach of this warranty occurs when a defect appears during this period; however, the buyer's remedy is exclusively limited to repair, replacement, or adjustment of that defective part. *See* Note, *Uniform Commercial Code — A Limited Remedy Fails of Its Essential Purpose Only in the Case of a Negligent or Willful Repudiation of the Remedy,* 51 TEXAS L. REV. 383, 386 (1972) (warranty is guarantee of quality while remedy is sanction imposed for breach of warranty).

23. *See* TEX. BUS. & COM. CODE ANN. § 2.719(a) (Tex. UCC) (Vernon 1968). This section of the U.C.C. allows the manufacturer to limit the buyer's remedies upon breach of warranty to repair or replacement:

> (1) the agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and (2) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which it is the sole remedy.

*Id.* § 2.719(a).

24. *See Magnuson-Moss Warranty-Federal Trade Commission Improvement Act,* 15 U.S.C. §§ 2301-12 (1976). Since the manufacturer's limited repair warranty does not comply with the federal minimum standards for "full" warranties at § 2304, it is a "limited" remedy; therefore, the "duration" of any implied warranties may be limited to the duration of the written warranty. *See id.* § 2308(b); *see also* Pertschuk, *Consumer Automobile Problems,* 11 U.C.C. L.J. 145, 149 n. 11 (1978) ("full" warranties that comply with § 2304 rare in automobile industry). *See generally* Hawkland, *Limitation of Warranty under the Uniform Commercial Code,* 11 HOW. L.J. 28 (1965) (thorough discussion of warranty disclaimers under U.C.C.); Moye, *Exclusion and Modification of Warranty under the U.C.C. — How to Succeed in Business Without Being Liable for Not Really Trying,* 46 DENVER L.J. 579 (1969) (analysis of effective warranty disclaimers in light of judicial interpretation).

25. *See* TEX. BUS. & COM. CODE ANN. § 2.719(c) (Tex. UCC) (Vernon 1968) (manufacturer permitted to exclude consequential damages unless exclusion "unconscionable"). *See generally* Weintraub, *Disclaimer of Warranties and Limitations of Damages for Breach of Warranty under the U.C.C.,* 53 TEXAS L. REV. 60, 63-74 (1974) (in-depth analysis of contractual limitations on liability).

26. TEX. BUS. & COM. CODE ANN. § 2.719(b) (Tex. UCC) (Vernon 1968) ("(b) where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this title"). The official comment to § 2.719 explains that "it is of the very essence of a sales contract that at least minimum adequate remedies be available," and where a clause might be fair and reasonable, circumstances can operate so as to deprive a party of the "substantial value of the bargain"; therefore, the party is eligible for any remedy as provided in the Title. *See id.* § 2.719 comment 1. Courts often rely on the comment to find a failure of essential purpose. *See* Riley v. Ford Motor Co., 442 F.2d 670, 673 (5th Cir. 1971). The court, finding a failure of essential purpose by relying on comment 1 to § 2.719, reasoned that enforcement of a limited remedy under circumstances where repeated efforts failed to correct the defect would deprive the buyer of the substantial value of his bargain. *See id.* at 673; *see also* Jacobs v. Rosemont Dodge-Winnebago South, 310 N.W.2d 71, 75 (Minn. 1981)

tionally taken an unusually strict stance in their interpretations of Section 2.719.[27] For example, in *Lankford v. Rogers Ford Sales,*[28] although the owner's new Thunderbird developed a total of fifty defects and was out of service for repair a total of forty-five days during the first eighteen months of ownership, the court found that as long as the dealer kept making good-faith efforts to repair, the limited remedy did not fail of its essential purpose.[29] In a subsequent case, a car owner, after three unsuccessful attempts by the dealer to repair the same defect, abandoned her car at the dealership.[30] The court, relying primarily on *Lankford,* reasoned that since there was no evidence that the car had been unsuccessfully repaired the fourth time, there was no failure of the limited remedy's essential purpose.[31]

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(not only will warrantor's willful refusal to repair cause exclusive remedy to fail of its essential purposes, but failure to repair within reasonable time will also cause failure of essential purpose); Ehlers v. Chrysler Motor Corp., 226 N.W.2d 157, 161 (S.D. 1975) (theory of "deprivation of the substantial value of the bargain" utilized in finding a failure of essential purpose).

27. *See* TEX. BUS. & COM. CODE ANN. § 2.719(b) (Vernon 1968); *see also* Note, *Failure of the Essential Purpose of a Limited Repair Remedy under Section 2.719 of the Uniform Commercial Code,* 32 BAYLOR L. REV. 292, 293 (1980) (for further examination of harsh burden placed upon Texas consumer seeking to abrogate limited repair remedy).

28. 478 S.W.2d 248 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.) (first time Texas court faced with question whether limited remedy of repair or replacement had failed of its essential purpose as contemplated by Code § 2.719(b)); *see also* Note, *Uniform Commercial Code — A Limited Remedy Fails of Its Essential Purpose Only in the Case of a Negligent or Willful Repudiation of the Remedy — Lankford v. Rogers Ford Sales,* 51 TEXAS L. REV. 383, 386 (1972-73) (upon thorough analysis of *Lankford,* author concludes court's decision was result of misinterpretation of § 2.719(b)).

29. *See* Lankford v. Rogers Ford Sales, 478 S.W.2d 248, 251 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.) (court affirmed summary judgment for defendants rejecting claim for damages, reasoning that there could be no failure of limited remedy's essential purpose without willful or negligent repudiation of its terms). *But see, e.g.,* Jacobs v. Rosemont Dodge-Winnebago South, 310 N.W.2d 71, 75 (Minn. 1981) (if seller refuses to repair or replace within reasonable time, buyer deprived of exclusive remedy and mere commendable efforts do not relieve seller of obligations to repair); Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349, 355-57 (Minn. 1977) (seller does not have unlimited time to deliver conforming goods; a remedy fails of its essential purpose when it becomes obvious automobile cannot or will not be restored to reasonably good operating condition); Moore v. Howard Pontiac-Am., Inc., 492 S.W.2d 227, 229 (Tenn. 1972) (no requirement that failure to repair be willful or negligent in order to find failure of essential purpose of limited repair remedy).

30. *See* Henderson v. Ford Motor Co., 547 S.W.2d 663, 667 (Tex. Civ. App.—Amarillo 1977, no writ) (after returning defective vehicle to dealership for fourth time, Mrs. Henderson refused tender of car).

31. *See id.* at 669. The defendant proved that the car was finally repaired after Mrs. Henderson refused to pick the car up. *See id.* at 667. The court disregarded the number of attempts it took defendant to repair and instead found that since the defects were repaired, the terms of the warranty were complied with. *See id.* at 669. *But see, e.g.,* Adams v. J. I. Case Co., 261 N.E.2d 1, 6 (Ill. 1970) (when defendant took inordinate amount of time to correct repairable defect, court found failure of purpose reasoning that when defendant "agreed to repair or replace the defective parts of the tractor there arose an implied warranty that the

Unfortunately, neither court followed the sound reasoning of the Fifth Circuit in *Riley v. Ford Motor Co.*,[32] which is a fair representation of the approach followed by many other jurisdictions faced with interpretation of Section 2.719.[33] In *Riley,* the court reasoned that a newly purchased automobile should eventually be put in good running condition and the seller does not have an unlimited time to do so.[34] In finding a failure of essential purpose, the court stated that "at some point in time, it must be obvious to all people that a particular vehicle simply cannot be repaired or parts replaced so that the same is made free from defect."[35] Since Texas courts have not adopted the Fifth Circuit's reasoning, the burden of showing a failure of essential purpose continues to be a substantial barrier to successful recovery in Texas.[36]

Once the buyer, however, is successful in establishing that his limited remedy has failed of its essential purpose, he then has available to him the whole range of UCC remedies which include revocation of acceptance and dam-

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manufacturers, and dealer would correct the defects within a reasonable time."); Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349, 355-57 (Minn. 1977) (unsuccessful repair after reasonable amount of time is failure of essential purpose); Goddard v. General Motors Corp., 396 N.E.2d 761, 764-65 (Ohio 1979) (even where defect repairable, court found failure of limited remedy's essential purpose when defect not cured within reasonable time). For an in-depth analysis of both *Lankford* and *Henderson*, see Note, *Failure of the Essential Purpose of a Limited Repair Remedy under Section 2.719 of the Uniform Commercial Code,* 32 BAYLOR L. REV. 292, 294-98 (1980).

32. 442 F.2d 670, 673 (5th Cir. 1971) (after new car developed total of fourteen defects, purchaser brought suit for breach of warranty and negligent repair).

33. *See* Stofman v. Keenan Motors, Inc., 14 U.C.C. REP. SERV. (Callaghan) 1252, 1254 (Pa. 1974). Finding a failure of essential purpose, the court reasoned: "The question we must consider is just how long the buyer must wait and how many unfulfilled promises may be made before he is entitled to revoke his acceptance of an automobile and be returned the purchase price. Our sympathies lie with those who repeatedly return their cars for repairs of service, then get them back in almost the same condition as when the complaints were originally registered". *See id.* at 1254; *see also* Beal v. General Motors Corp., 354 F. Supp. 423, 426 (Del. 1973) (from buyer's point of view purpose of exclusive remedy is to provide goods that conform to contract within reasonable time after defective part discovered; limited exclusive remedy fails of its purpose and is avoided under § 2.719(b), whenever warrantor fails to correct defect within reasonable time); Orange Motors of Coral Gables, Inc. v. Dade County Dairies, Inc., 258 So.2d 319, 321 (Fla. 1972) (automobile purchaser not bound to permit seller to tinker with car indefinitely in hopes of ultimate compliance with warranty).

34. *See* Riley v. Ford Motor Co., 442 F.2d 670, 673 (5th Cir. 1971) (citing General Motors Corp. v. Earnest, 184 So.2d 811, 814 (Ala. 1966)).

35. *See* Riley v. Ford Motor Co., 442 F.2d 670, 673 (5th Cir. 1971) (thereafter finding failure of purpose since repeated but unsuccessful attempts at repair operate to deprive buyer of substantial value of bargain).

36. *See* Henderson v. Ford Motor Co., 547 S.W.2d 663, 664 (Tex. Civ. App.—Amarillo 1977, no writ) (both Texas cses find no failure of limited remedy's essential purpose regardless of dealer's inability to successfully repair within reasonable time); Lankford v. Rogers Ford Sales, 478 S.W.2d 248, 251 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.).

ages for breach of warranty.[37] If he chooses to revoke acceptance and, thus, obtain a return of his purchase price, the buyer must prove that the nonconformity, "substantially impairs" the value of the automobile to him.[38] In addition, he must show that he has revoked within a "reasonable time" upon discovery of the defect.[39] Having successfully accomplished these two tasks, recovery may still be denied. For example, depending on the jurisdiction, continued use of the vehicle by the owner after attempted revocation may invalidate his claim.[40] Also, in some states, including Texas, revocation

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37. See TEX. BUS. & COM. CODE ANN. § 2.719(b) (Tex. UCC) (Vernon 1968); *see also* Jacobs v. Metro Chrysler-Plymouth, Inc., 188 S.E.2d 250, 253 (Ga. 1972). Upon a finding of failure of purpose the court explained that the statement in the warranty limiting the buyer's remedy to repair or replacement of defective parts referred to remedies available "upon discovery of a defect, not remedies available to the purchaser after the seller has breached its warranty. . . ." *See Jacobs v. Metro-Chrysler-Plymouth, Inc.*, 188 S.E.2d at 253.

38. *See* TEX. BUS. & COM. CODE ANN. § 2.608 (Tex. UCC) (Vernon 1968) (buyer may revoke acceptance of product where nonconformity substantially impairs its value to him). Courts have had trouble determining what constitutes "substantial" because of the uncertainty of whether to use a subjective approach or an objective one. *Compare* Sauers v. Tibbs, 363 N.E.2d 444, 449 (Ill. 1977) (effect of impairment on user critical and not dollar value of repairs) *with* Freeman Oldsmobile Mazda Co. v. Pinson, 580 S.W.2d 112, 114 (Tex. Civ. App.—Eastland 1979, writ ref., n.r.e.) ($75 to $100 defect in $5,720.33 automobile not such nonconformity so as to substantially impair value of car). For additional inconsistent decisions on the issue of what constitutes substantial impairment, see Koperski v. Husker Dodge, 302 N.W.2d 655, 658-660, 662 (Neb. 1981) (car vibrated at speeds of 35-40 mph., engine died when air conditioning turned on and when put in reverse, stopping and jerking when gears failed to shift, "rubbing metallic sound," radiator work done, and transmission replaced with unsuccessful results, and court did *not* find proof of substantial impairment); Zabriskie Chevrolet, Inc. v. Smith, 240 A.2d 185, 205 (N. J. 1968) (revocation allowed even when curable defect shakes buyer's confidence in automobile); Murray v. Holiday Rambler, Inc., 265 N.W.2d 513, 521 (Wis. 1978) (cumulative effect of many minor defects will cause substantial impairment). *See generally* 2 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2.608 at 13 (1971) (test of substantial impairment not determined by dollar percentage but by effect of defect on intended user); Adams, *Revocation of Acceptance: The Test for Substantial Impairment*, 32 U. PITT. L. REV. 439 (1971) (survey of case law interpretation of substantial impairment).

39. *See* TEX. BUS. & COM. CODE ANN. § 2.608(b) (Tex. UCC) (Vernon 1968). The buyer must revoke his acceptance within a reasonable time of discovering the defect. *See id.* § 2.608(b). Generally, the reasonableness of time requirement is interpreted leniently since it is the seller's attempts to repair the defects which causes the delay. *See, e.g.*, Tiger Motor v. McMurtry, 224 So. 2d 638, 647 (Ala. 1969) (after repeated attempts at adjustment had failed, court found buyer revoked within reasonable time); Frontier Mobile Home Sales v. Trigleth, 505 S.W.2d 516, 517 (Ark. 1974) (buyer should not be penalized for continued patience with seller who promises to repair nonconforming defect); Conte v. Dwan Lincoln-Mercury, 374 A.2d 144, 149 (Conn. 1976) (because of continuous series of negotiations and repairs, delay in notice to revoke acceptance not found to prejudice dealer and therefore not unreasonable).

40. *See* TEX. BUS. & COM. CODE ANN. § 2.608(c) (Tex. UCC) (Vernon 1968). Subsection (3) provides that one who revokes acceptance "has the same rights and duties with regard to the goods as if he had rejected them." *See id.* § 2.608(c). He is, therefore, bound by

against the manufacturer is precluded for lack of contractual privity.[41]

If the buyer cannot successfully revoke his acceptance, he may still be able to recover damages for breach of warranty under Section 2.714.[42] The usual measure of damages for breach of warranty is "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted."[43]

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§ 2.602(2) which provides that "after rejection any exercise of ownership by the buyer with respect to any commerical unit is wrongful as against the seller." *See id.* § 2.602(b)(1); *see also* Waltz v. Chevrolet Motor Division, 307 A.2d 815, 816 (Del. 1973) (revoking buyer has same duties as rejecting buyer, including duty under § 2.602(2)(a) not to exercise ownership over goods; thus, continued use invalidated revocation); Charney v. Ocean Pontiac, Inc., 17 U.C.C. REP. 982, 982 (Mass. 1975) (continued use of automobile defeats buyer's right to revoke); Fecik v. Capindale, 10 U.C.C. REP. 1391, 1392 (Pa. 1971) (continued use of and payment toward automobile for more than one year after buyer unsuccessfully attempted to revoke from seller invalidates buyer's cause of action for revocation of acceptance). *But see* Moore v. Howard Pontiac-Am., 492 S.W.2d 227, 230 (Tenn. 1972) (recognized buyer's need to use car thus allowed post-revocation use). Those courts that do allow post-revocation use, usually allow the seller a reasonable offset for the buyer's use. *See* Orange Motors of Coral Gables, Inc. v. Dade County Dairies, Inc., 258 So. 2d 319, 321 (Fla. 1972); Johannsen v. Minnesota Valley Ford Tractor Co., 304 N.W.2d 654, 658 (Minn. 1981). *See generally* Note, *Buyer's Continued Use of Goods After Revocation of Acceptance under the Uniform Commercial Code,* 24 WAYNE L. REV. 1371, 1373-80 (1978) (for further treatment of post-revocation use of defective goods).

41. *See* Henderson v. Ford Motor Co., 547 S.W.2d 663, 667 (Tex. Civ. App.—Amarillo 1977, no writ) (in disallowing buyer to revoke acceptance against manufacturer, court reasoned that since case was not strict liability but economic loss, privity of contract required); Emmons v. Durable Mobile Homes, Inc., 521 S.W.2d 153, 154 (Tex. Civ. App.—Dallas 1974, no writ) (buyer cannot rescind contract in suit against manufacturer since no privity of contract). *But see* Ventura v. Ford Motor Co., 433 A.2d 801, 811 (N.J. 1981). While it was acknowledged that revocation of acceptance is a right "available to a buyer against a seller in privity," the court held that when "the manufacturer gives a warranty to induce the sale, it is consistent to allow the same type of remedy as against that manufacturer." *See id.* at 811; *see also* Henningsen v. Bloomfield Motors, 161 A.2d 69, 83 (N.J. 1960) (obligations of manufacturers should not be based solely on privity of contract).

42. *See* TEX. BUS. & COM. CODE ANN. § 2.719(b) (Tex. UCC) (Vernon 1968) (upon finding of failure of limited remedy's essential purpose, buyer entitled to remedy provided in title). The buyer who is no longer limited to the remedy of repair or replacement may subsequently recover damages for breach of warranty under TEX. BUS. & COM. CODE ANN. § 2.714 (Tex. UCC) (Vernon 1968). At least one court, however, has disallowed a breach of warranty suit against the dealer for lack of privity. *See* Bill McDavid Oldsmobile, Inc. v. Mulcahy, 533 S.W.2d 160, 164 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ) (buyer not entitled to sue dealer for breach of warranty because mere delivery of manufacturer's warranty to purchaser by dealer does not make dealer party to instrument).

43. *See* TEX. BUS. & COMM. CODE ANN. § 2.714(b) (Tex. UCC) (Vernon 1968). While other measures of damages are accepted by courts, there seems to be some inconsistency in Texas as to what amount of evidence is necessary to prove such damages. *Compare* Jordan Ford, Inc. v. Alsbury, 625 S.W.2d 1, 3 (Tex. App.—San Antonio 1981, no writ) (while cost of reasonable repairs acceptable measure of actual damages for breach of warranty, testimony of price paid to repair vehicle insufficient to prove amount reasonable) *with* Tom Benson Chevro-

In Texas, once the buyer successfully revokes his acceptance,[44] or establishes a breach of warranty,[45] he may recover additional damages under the Texas Deceptive Trade Practices and Consumer Protection Act (DTPA).[46] While the potential recovery under the DTPA could be very rewarding, decisions handed down by Texas courts have been very unpredictable, thereby making recovery for Texas consumers uncertain.[47]

The high costs of extensive litigation coupled with the well-founded fear of nonrecovery, make it evident why many discouraged lemon owners with meritorious cases have abandoned their causes and absorbed their losses.

## III. THE TEXAS LEMON LAW: A DEFINITIVE CAUSE OF ACTION DIRECTLY AGAINST THE MANUFACTURER

The Texas Legislature realized the lemon owners' need for relief[48] in the

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let, Inc. v. Alvarado, 636 S.W.2d 815, 823 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.) (owner's testimony that, in her opinion, present value of vehicle $500, sufficient to sustain finding of $4,100 in diminished market value).

44. *See* Freeman Oldsmobile Mazda Co. v. Pinson, 580 S.W.2d 112, 133 (Tex. Civ. App.—Eastland 1979, writ ref. n.r.e.). In order for buyer to have his purchase price refunded under DTPA, he must first prove that he has revoked acceptance by proving that the nonconformity substantially impaired the value of the automobile to him. *See id.* at 133.

45. *See* Jordan Ford, Inc. v. Alsbury, 625 S.W.2d 1, 1 (Tex. App.—San Antonio 1981, no writ) (basis of action brought under DTPA was breach of warranty); *see also* Tom Benson Chevrolet, Inc. v. Alvarado, 636 S.W.2d 815, 823 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.) (diminished market value measure of damages for breach of warranty which was basis of action brought under DTPA).

46. *See* TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon Supp. 1984). In addition to the actual damages, a consumer who files suit under the DTPA may also recover twice the amount of actual damages awarded not in excess of one thousand dollars. *See id.* § 17.50(a)(2) & (b)(1). If the court finds the breach to have been committed knowingly, treble damages may be awarded of those damages in excess of one thousand dollars. *See id.* § 17.50(b)(1). The consumer may also recover reasonable attorney's fees and court costs. *See id.* § 17.50(d). Texas courts have been inconsistent in their decisions of whether to allow incidental and consequential damages which have been contractually disclaimed. *Compare* Orr Chevrolet, Inc. v. Courtney, 488 S.W.2d 883, 886-87 (Tex. Civ. App.—Texarkana 1972, no writ) (recovery did not include damages for loss of vehicle as result of breach of express warranty when such damages had been disclaimed) *with* San Montgomery Oldsmobile Co. v. Johnson, 624 S.W.2d 237, 243 (Tex. App.—Houston [1st Dist.] 1981, no writ) (owner entitled to recover loss of rentals resulting when agreements to lease vehicle with third parties could not be performed because of vehicle malfuncations even though such commercial losses were disclaimed).

47. *See Hearings on Tex. H.B. 2211 Before the House Comm. on Transportation,* 68th Leg. (April 19, 1983). Clyde Farrell, Assistant Attorney General, Chief of the Consumer Protection Division, describes the uncertainty of recovery in Texas when there is a disclaimer of warranties and a limitation of remedies as a "very critical gap in Texas law." *See id.*

48. *See Hearings on Tex. H.B. 2211 Before the House Comm. on Transportation,* 68th Leg. (April 20, 1983). The Committee heard testimony of several Texas consumers. *See id.* One consumer purchased a diesel Oldsmobile which, by the time the car had logged 54,000 miles, the transmission had been rebuilt three times and had been returned to the repair shop

form of a clearly defined cause of action directly against the manufacturer, and through a low cost, readily accessible dispute resolution system.[49] The "Warranty Performance Obligations" provision of S.B. 1141 — H.B. 2211 provides such relief.[50] The Texas Lemon Law, as it is unofficially known, is patterned in substance after Connecticut's law which was the first of its kind to be enacted.[51]

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fifty-nine times but had yet to be repaired. *See id.* The frustrated consumer testified that after she had been "all around the mulberry bush," she still had received no cooperation or relief from General Motors and has had to file suit. *See id.* Another consumer testified to a wide range of defects occurring in her "lemon" including the flow of transmission fluid through the speedometer. *See id.* Finally, one consumer expressed the frustration felt by many lemon owners: "I want to tell you why I'm so concerned about it. My feeling is that very soon now, that car is going to be where it just won't run at all and I still owe three and half years on it. . . ." *See id.*

Clyde Farrell, Assistant Attorney General, Chief of the Consumer Protection Division stressed the importance and need for such a law since recovery under the doctrine of revocation of acceptance is so uncertain in Texas when there has been such disclaimers or limitations of remedies and warranties. *See id.*

49. *See* Jones, *Wanted: A New System for Solving Consumer Grievances,* 25 ARB. L.J. 234, 234-35 (1970). For most consumers, "the formalities and cost of litigation make recourse to the law either unpalatable or unfeasible;" therefore, the author stresses that "[o]ne of the most important aspects of consumer protection today concerns the availability of effective machinery for the resolution of consumer grievances in the marketplace. *See id.* at 234-35; *see also* Jones and Boyer, *Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies,* 40 GEO. WASH. L. REV. 357, 362 (1972). "The existence of a workable grievance-solving mechanism would also alleviate another, more subtle external cost that is imposed upon society: the lingering, rankling sense of frustration experienced by the consumers who feel they have been cheated but realize that justice is priced beyond their means." *Id.* at 362.

50. *See* TEX. REV. CIV. STAT. ANN. ann. 4413(36), § 6.07 (Vernon Supp. 1985); *see also Hearings on Tex. S.B. 1411 Before the Senate Comm. on Economic Development,* 68th Leg. 9 (1983). Gene Fondren of TADA explains the bill as providing a "new cause of action" for the lemon owner directly against the manufacturer or distributor. *See id.* at 9. The statute also preconditions the use of the lemon presumption upon submission before the Texas Motor Vehicle Commission for a hearing on the merits of the consumer's case. *See* TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07(e) (Vernon Supp. 1985). As brought out by Rep. Schleuter before the Committee, this provision of the bill provides the consumer with an effective and inexpensive dispute resolution system. *See Hearings on Tex. H.B. 2211 Before the House Comm. on Transportation,* 68th Leg. (April 19, 1983) (statement of Rep. Schleuter, bill sponsor).

Besides providing the consumer with a definitive cause of action and an inexpensive dispute resolution system, the most important consumer relief will be in the form of better warranty repair service. *See Hearings on Tex. S.B. 1411 Before the Senate Comm. on Economic Development,* 68th Leg. 12 (April 20, 1983) (statement of Mr. Fondren of TADA). The bill will provide the manufacturers with the incentive to make sure their dealers have efficient warranty repair service. *See id.* at 12.

51. *See* CONN. GEN. STAT. § 42-179 (West 1985) (enacted June 4, 1982, effective October 6, 1983); *see also* Honignan, *The New Lemon Laws: Expanding U.C.C. Remedies,* 17 U.C.C. L.J. 116, 118 (1984) (most states have patterned their lemon laws after Connecticut's, with

In summary, the Texas statute first provides that if a new[52] motor vehicle[53] does not conform to the manufacturer's express warranties,[54] and the owner[55] reports such nonconformity to the manufacturer or its dealer[56] during the warranty period or within one year from original delivery of the vehicle, whichever is earlier, the manufacturer or dealer must make whatever repairs are necessary to conform the vehicle to the warranty.[57] If the manufacturer is unable to cure the defect after a reasonable number of attempts at repair, and if the nonconforming defect substantially impairs[58]

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variations from state to state); Note, *The Connecticut Lemon Law,* 5 BRIDGE. L. REV. 175, 178-82 (1983) (comprehensive analysis of Connecticut's "Lemon Law"); Note, *Sweetening the Fate of the "Lemon" Owner: California and Connecticut Pass Legislation Dealing with Defective New Cars,* 14 TOLEDO L. REV. 341, 345-51 (1983) (comparative examination between Connecticut's "lemon law" and California's "lemon law" which was second to be enacted); Note, *Lemon Laws: Putting the Squeeze on Automobile Manufacturers,* 61 WASH. U. L. Q. 1125, 1126-34 (1983) (survey of eighteen lemon laws that had been enacted thus far including Texas' law).

52. *See* TEX. REV. CIV. STAT. ANN. art. 4413(36), § 1.03(2) (Vernon Supp. 1985). A "new" motor vehicle is defined as one which has not been the subject of a "retail sale"; therefore, "demonstrator" models would also be subject to the lemon law. *See id.*

53. *Compare* TEX. REV. CIV. STAT. ANN. art. 4413(36), § 1.03(1) (Vernon Supp. 1985) (Motor Vehicle Code now defines "motor vehicle" to include engine, transmission, and rear axles of heavy duty trucks, and "two or more wheeled" off-road vehicles) *with* CAL. CIV. CODE § 1793.2(e)(4)(B) (West 1984) (specifically excludes "motorcycles, motor homes, or off-road vehicles" from lemon law coverage and further limits "new motor vehicles" to one bought primarily for "personal, family, or household purposes").

54. *Compare* CAL. CIV. CODE § 1793.2(a) (West 1985) (one of many lemon laws which only apply to manufacturer's express warranties) *with* N. H. REV. STAT. ANN. § 357-D:2, § 357-D:3 (Supp. 1984) (includes both express and implied warranties under lemon law coverage).

55. *See* TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07(a) (Vernon Supp. 1985). For purposes of the lemon law provision an "owner" means:

> [T]he person so designated on the certificate of title to a motor vehicle issued by the State Department of Highways and Public Transportation, or an equivalent document issued by the duly authorized agency of any other state, or any person to whom such motor vehicle is legally transferred during the duration of the manufacturer's or distributor's express warranty applicable to such motor vehicle, and any other person entitled by the terms of such warranty to enforce the obligations thereof.

*Id.*

56. *See id.* § 6.07(b) (actual language is "to the manufacturer or distributor, its agent, or its authorized dealer").

57. *See id.* § 6.07(b) (statute expressly states provision does not limit remedies otherwise available to new car owner under warranty that extends longer than one year).

58. *See id.* § 6.07(c); *see also, e.g.,* CAL. CIV. CODE § 1793.2(e)(4)(A) (West 1985); MASS. GEN. LAWS ANN. ch. 90 7Nl/2 (West 1984); NEB. REV. STAT. § 60-2703 (Supp. 1984) (all require substantial impairment and like Texas statute, do not define what interpretation is to be given term). One can only speculate that "substantial impairment" should be given an objective interpretation when one compares it to the subjective language of the Connecticut Lemon Law provision. *See* CONN. GEN. STAT. ANN. § 42.179(d) (West 1985) ("a defect or

the use and market value[59] of the vehicle, the manufacturer[60] shall replace the vehicle with one comparable,[61] or refund to the owner the purchase price,[62] less a reasonable allowance for the owner's use of the vehicle.[63] The

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condition which substantially impairs the use, safety or value of the motor vehicle *to the consumer")* (emphasis added).

59. *Compare* MINN. STAT. § 325 F. 665(3)(a) (Supp. 1985) (substantial impairment of "use and market value") *with* CAL. CIV. CODE § 1793.2(e)(4)(A) (West 1984) (substantial impairment of "use, value, or safety"); *see also* Honigman, *The New "Lemon Laws": Expanding U.C.C. Remedies,* 17 U.C.C. L.J. 116, 121 (1984). Approximately half of the states follow Connecticut's language of "use and value" and the other half follow California's "use, value, or safety." *See id.* at 121. *Honigman* observes that the "use, value, or safety" language might provide more coverage. *See id.* For further variations, see MONT. CODE ANN. § 61-4-503(1) (1983) ("use and market value or safety"); NEB. REV. STAT. § 60-2703 (Supp. 1983) ("use or market value"); WYO. STAT. ANN. § 40-17-101(c) (Supp. 1984) ("use and fair market value").

60. *See Debate on Tex. H.B. 2211 on the Floor of the House,* 68th Leg. (May 17, 1983). In opposition to the Hackney amendment which would have made dealers as well as manufacturers liable to lemon owners, Rep. Schleuter and Rep. Salinas illustrate their point:

> Rep. Salinas: "How many dealers in Texas make cars?"
>
> Rep. Schleuter: "None that I know."
>
> Rep. Salinas: "Why should they have to give you a new car when they don't have anything to do with the making of it?"
>
> Rep. Schleuter: "I don't think they should."

*Id.*

61. *See id.* Rep. Clemments' amendment which would have required replacement with a *new* comparable vehicle was rejected. *See id.* Rep. Schleuter, arguing against the proposed amendment, stated that the whole idea behind the bill is to allow the Motor Vehicle Commission to look into each case and decide "what is fair." *See id.* Rep. Delay, concurring, stated that the amendment could "completely remove any flexibility in arbitration over the facts of the case. . . ." *See id.* Therefore, the lemon owner could receive a replacement vehicle that already has logged mileage, to compensate for the use he has made of his vehicle. *See id. But see* Rigg, *Lemon Laws Should be Written to Ensure Broad Scope and Adequate Remedies,* 17 CLEARINGHOUSE REV. 302, 306 (1983) ("uncertainty as to what constitutes a comparable replacement will lead to unnecessary litigation"). For variations in other states, see CONN. GEN. STAT. ANN. § 42-179(d) (West 1985) (provides option of replacement with "new motor vehicle acceptable to the consumer"); FLA. STAT. ANN. § 681.102(2) (West 1985) (defines comparable motor vehicle as one of the same model, year, and equivalent condition at time of replacement).

62. *See Debate on Tex. S.B 1411 on the Floor of the Senate,* 68th Leg. 3 (April 18, 1983). The original language of S.B. 1411 specifically excluded "sales tax, registration fees or other official fees from the amount the buyer could be refunded." *See id.* at 3. However, an amendment proposed by Senator Glascow struck that language from the bill so that the buyer could be afforded the opportunity to recover that amount. *See id. But see Debate on Tex. H.B. 2211 on the Floor of the House,* 68th Leg. (May 17, 1983). Rep. Luna proposed an amendment to insert the following language after "purchase price:" "including, but not limited to sales tax dealer preparation charges, insurance premiums on a policy that would be cancelled, and the full amount of interest paid." *See id.* Rep. Schleuter, in opposing the rejected amendment, stated that it should be within the discretion of the arbitration committee whether or not to

statute then creates the presumption[64] that a "reasonable number of attempts to repair" have been made when: (1) the same defect is subject to unsuccessful repair for four or more times;[65] or (2) the vehicle has been out of service for repair for a total of thirty or more days during the express warranty term or within one year from delivery date, whichever is earlier.[66]

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refund this amount. *See id.* Other states do provide for reimbursement of such collateral charges. *See, e.g.,* CONN. GEN. STAT. ANN. § 42-179 (West 1985) (may recover contract price and all collateral charges); MINN. STAT. § 325 F. 665(3)(a) (Supp. 1985) (in addition to full purchase price, consumer entitled to recover cost of options or modifications, and all other charges including, but not limited to, sales tax, license fees, and registration fees); NEB. REV. STAT. § 60-2703 (Supp. 1983) (may recover purchase price including all sales taxes, license fees, registration fees and any similar governmental charges). Some states also provide for recovery of attorneys fees and court costs. *See, e.g.,* CONN. GEN. STAT. ANN. § 42-1 (West 1985) (in any action against manufacturer or dealer based on express or implied warranty, court may award plaintiff "his costs and reasonable attorney's fees."); MINN. STAT. § 325 F. 665(6) (Supp. 1985) (may recover court costs and disbursements, including attorney's fees); NEB. REV. STAT. § 60-2707 (Supp. 1983) (attorney's fees may be awarded to the consumer who prevails in an action under lemon law). In Texas, it is up to the Commission whether the manufacturer will have to replace the car or refund the purchase price. *See Hearings on Tex. S.B. 1411 Before the Senate Comm. on Economic Development,* 68th Leg. 6-8 (April 11, 1983) (Mr. Fondren of TADA explaining provisions of S.B. 1411). In other states, the manufacturer may provide a refund or replacement at his own option. *See* Honigman, *The New "Lemon Laws": Expanding U.C.C. Remedies,* 17 U.C.C. L.J. 116, 118-19 (1984) ("lemon laws" allow consumers recovery of purchase price and collateral charges or replacement vehicle at manufacturer's option). *But see* MINN. STAT. § 325 F.665(3)(a) (Supp. 1984) (consumer can elect either replacement vehicle or refund of purchase price).

63. *See* TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07(c) (Vernon Supp. 1985) (reasonable allowance for use is amount directly attributable to use of motor vehicle prior to first report of nonconformity and during any subsequent period when vehicle not out of service for repair). *But see* CAL. CIV. CODE § 1793.2(d) (West 1985) (amount deducted for buyer's use limited to only that period prior to discovery of nonconformity); *see also* MINN. STAT. § 325 F.665(3)(a) (Supp. 1984) (reasonable allowance for consumer's use of vehicle must not exceed ten cents per mile or ten percent of purchase price of vehicle, whichever less).

64. *See* Note, *L.B. 155: Nebraska's "Lemon Law": Synthesizing Remedies for the Owner of a "Lemon",* 17 CREIGHTON L. REV. 345, 372-73 (1984). When the consumer is unable to raise the presumption, if for example his car has been repaired many times for different defects or has been out of service only twenty-nine days, he can still sue under the lemon law by sustaining the burden of proving a reasonable number of attempts have been made to repair. *See id.* at 372-73.

65. *But see* FLA. STAT. ANN. § 681.104(3)(a) (West 1985) (presumption of reasonable number of attempts raised after three repair attempts or fifteen business days during warranty period or one year, whichever earlier); MINN. STAT. § 325 F.665(3)(c) (Supp. 1984). The presumption of a reasonable number of attempts to repair arises only after one attempt if the nonconformity results in a "complete failure" of the braking or steering system and is likely to cause death or serious bodily injury if the vehicle is driven. *See id.* § 325 F.665(3)(c). The vehicle returned under the lemon law with such braking or steering defect may not be resold in Minnesota. *See id.* § 325 F.665(4)(b).

66. *See* TEX. REV. CIV. STAT. ANN. art. 4413(36) § 6.07(d) (Vernon Supp. 1985) (thirty day period, warranty term, and one year period will be extended if repair service not available

The presumption shall apply only if the consumer has directly notified the manufacturer of the defect in writing and has given the manufacturer an opportunity to cure the defect.[67] The manufacturer is provided with an affirmative defense if "(1) the nonconformity is the result of abuse, neglect, or unauthorized modifications or alterations of the motor vehicle; or (2) the nonconformity does not substantially impair the use or value of the motor vehicle."[68] The statute then specifically states that the provision is not available in a suit against the seller, but only against the manufacturer or distributor, and further provides that the consumer's rights or remedies under any other law are not limited by the provision.[69] A proceeding under the Lemon Law, however, may be brought only within six months following (1) the expiration of the express warranty period; or (2) one year after the date of "original delivery" of the vehicle to the owner.[70]

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by reason of "war, invasion, strike or fire, flood or other natural disaster"). *But see* N. Y. GEN. BUS. LAWS § 198-a(d) (McKinney Supp. 1984) (time period within which four attempts to repair or thirty days must occur extended to two years or 18,000 miles, whichever earlier); *see also* Honigman, *The New "Lemon Laws": Expanding U.C.C. Remedies,* 17 U.C.C. L.J. 116, 118 (1984) (more than half of lemon law states use thirty business days rather than calendar days as out-of-service period).

67. *See* TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07(d) (Vernon Supp. 1985) (statute does not specify when notice must be given; just that it must be given before presumption can be used). *But see Hearings on Tex. H.B. 2211 Before the House Comm. on Transportation,* 68th Leg. (May 11, 1983). There was opposition to the requirement of written notice from Jim Boyle, Legislative Director of Texas Consumers Association, and Clyde Farrell, Assistant Attorney General, Chief of the Consumer Protection Division. *See id.* While it was agreed that written notice was a good idea to enable the consumer to prove that notice was given, making the requirement mandatory would operate as a "unnecessary obstacle" to consumer recovery. *See id.; see also* Rigg, *Lemon Laws Should be Written to Ensure Broad Scope and Adequate Remedies,* 17 CLEARINGHOUSE REV. 302, 308 (1983). The provision requiring notice to the manufacturer could operate to unnecessarily deprive a consumer of a cause of action under the lemon law. *See id.* at 308. The dealer who is in daily contact with the manufacturer should be required to give the necessary notice. *See id.* at 308.

68. TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07(c) (Vernon Supp. 1985).

69. *See id.* § 6.07(f).

70. *See id.* § 6.07(h) (Vernon Supp. 1985). *But see* Rigg, *Lemon Laws Should be Written to Ensure Broad Scope and Adequate Remedies,* 17 CLEARINGHOUSE REV. 302, 308 (1983). The same eighteen month limitation on a lemon law proceeding was proposed by manufacturers in Massachusetts. *See id.* at 308. Rigg described this provision as an "ill-disguished attempt to frustrate the purposes of the act by cutting off buyer rights." *See id.* at 308. For example, a consumer who discovers a defect just under one year from delivery and gives the manufacturer four attempts to correct the defect, will probably exceed his eighteen month deadline. *See id.* at 308. The general statute of limitations, which would apply without the eighteen month limitation, adequately protects against old claims. *See id.* at 308; *see also* CAL. CIV. CODE § 1793.2(e)(2) (West 1985) (specifically provides for tolling of statute of limitations during third party resolution process). *But see* TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07 (Vernon Supp. 1985) (Texas makes no provision for tolling of statute of limitations on subsequent *de novo* cause of action).

## IV. THE TEXAS LEMON LAW PROVIDES A DISPUTE RESOLUTION SYSTEM WHICH DIFFERS FROM THOSE PROVIDED BY ALL OTHER STATES' LEMON LAWS

Besides providing a clearly defined cause of action against the manufacturer, the lemon laws provide the consumer with another important benefit: a low-cost, readily available mechanism for resolving their disputes.[71] Almost all states' lemon laws provide that if a manufacturer sets up a dispute settlement mechanism that conforms to the federal regulations for such mechanisms, the consumer must resort to those arbitration boards before qualifying for the provisions of the lemon law in a court action.[72] The federal requirements for Informal Dispute Settlement Mechanisms (IDSM), promulgated by the FTC pursuant to the Magnuson-Moss Warranty Act,[73] are designed to ensure that the mechanism's members and staff are not influenced by the warrantor/sponsor.[74] Under the regulations, although the mechanism's decision is not binding on either party, it is admissible in evidence in any subsequent action brought by the purchaser arising out of the same warranty claim.[75]

The Texas lemon law is the only one of its kind to condition the availability of its provisions upon a hearing before a state agency instead of a manu-

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71. *See* TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07(e) (Vernon Supp. 1985). *See generally Hearings on Tex. S.B. 1411 Before the Senate Comm. on Economic Development,* 68th Leg. 5 (side 2) (April 20, 1983) (Mr. Fondren explains that it is standard for lemon laws to provide for grievance solving mechanisms).

72. *See, e.g.,* CAL. CIV. CODE § 1793.2(e)(3) (West Supp. 1985); ILL. REV. STAT. ch. 121-1/2 § 1204(a) (1983); MINN. STAT. 325 F.665(5) (Supp. 1985) (requires only that IDSM "substantially comply" with FTC's regulations). *But see* N. C. GEN. STAT. § 25-2-103(1)(d) (Supp. 1985). Besides Texas, North Carolina is the only state not to provide for use of an IDSM sponsored by the manufacturer. *See id.* § 25-2-103(1)(d) North Carolina's lemon law, however, is not a "true" lemon law in that it merely changes the U.C.C. definition of a "seller" to include manufacturer of a motor vehicle who makes an express warranty, thereby eliminating privity problems for the buyer. *See id.* § 25-2-103(1)(d).

73. *See Magnuson-Moss Warranty — Federal Trade Commission Improvement Act,* 15 U.S.C. § 2301 (1976).

74. *See* 16 C.F.R. § 703.3-.5 (1984). Some of the federal regulations for these dispute settlement mechanisms include: (1) the mechanism be funded and staffed by the warrantor and provided to the consumer free of charge, (2) no arbitration panel member may be an employee or agent of a party other than for the purposes of arbitration, (3) two-thirds of the members cannot have any "direct involvement in the manufacture, distribution, sale or service of any product," (4) the decision is not binding on any party, but the manufacturer must make a "good faith" effort to comply with the decision, (5) the mechanism has the duty to collect the information relevant to the dispute, (6) the parties are entitled to make oral arguments, under certain conditions including agreement by *both* parties, and (7) a decision must be made within forty days of the complaint. *See id.* 703.3-.5 *See generally* Schroeder, *Private Actions under the Magnuson-Moss Warranty Act,* 66A CAL. L. REV. 1, 33-35 (1973) (brief summary of operation of IDSMs as set up pursuant to FTC's regulations).

75. *See* 16 C.F.R. § 703.5(j) (1984).

facturer-sponsored dispute settlement mechanism.[76] Section 6.07 extends the authority already possessed by the existing Texas Motor Vehicle Commission to handle automobile warranty complaints[77] by also giving the Commission the power to order a replacement vehicle or a refund of the purchaser's price.[78] The Commission, which consists of nine members, five of whom are dealers,[79] is empowered to "hold hearings, administer oaths, receive evidence, and issue subpoenas to compel the attendance of witnesses and the production of papers and documents related to the hearing" in order to make a decision in the manufacturer-consumer warranty dispute.[80] If the consumer is dissatisfied by the Commission's decision, the Lemon Law provides him with the right of a trial *de novo* in which the Commission's decision is not admissible in evidence against him.[81] There is no similar

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76. *See* TEX. REV. CIV. STAT. ANN. art. 4413(36), § 607(e) (Vernon Supp. 1985). *See Hearings on Tex. S.B. 1411 Before the Senate Comm. on Economic Development,* 68th Leg. 14 (April 20, 1983). Mr. Fondren explains that the mechanism providing for a hearing as a condition to bringing suit under the lemon law is the only substantial difference between the Texas Lemon Law and lemon laws of other states. *See id.* at 14.

77. *See* TEX. REV. CIV. STAT. ANN. art. 4413(36), § 3.02-.06 (Vernon Supp. 1985) ("Powers and Duties" of the Texas Motor Vehicle Commission); *see id.* §§ 5.02(8) (makes it unlawful for any manufacturer, distributor or representative to fail to perform its warranty obligations after complaint and hearing by Commission); & § 4.07 (requiring dealers to provide notice of complaint procedure to every new car buyer). Mr. Fondren pointed out the utility of merely extending the authority of the Commission which already handles warranty complaints, especially since there was already a notice provision required by law. *See Hearings on Tex. S.B. 1411 Before the Senate Comm. on Economic Development,* 68th Leg. 2, 4 (side 1) (April 20, 1983).

78. *See* TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07(e) (Vernon Supp. 1985). The Commission is authorized to "adopt rules and conduct hearings for the enforcement and implementation of this section" and "Subchapter C" of the Act is applicable (referring to § 3.02-.06). *See id.* § 6.07(e).

79. *See id.* § 2.03(a). No two dealer/members are allowed to be franchised by the same manufacturer or distributor. *See id.* § 2.03(a). The other four non-dealer members shall be "persons from the public . . . who do not have, except as consumers, interests in any business that manufactures, distributes, or sells new motor vehicles." *See id.* § 2.03(a); *see also id.* § 2.02 (members appointed by Governor with advice and consent of Senate).

80. *Id.* § 3.04. The consumer is not forced to go to Austin to be heard because, in the past, the Commission has gone to the locality of the aggrieved consumer to conduct the hearings. *See Hearings on Texas S.B. 1411 Before the Senate Comm. on Economic Development,* 68th Leg. 7 (side 2) (April 20, 1983) (statement of Mr. Fondren of TADA). The average length of time it takes the Commission to render a decision is approximately forty-two days. *See Hearings on Tex. H.B. 2211 Before the House Comm. on Transportation,* 68th Leg. (1983) (statement by Mr. Fondren). This is comparable to the FTC regulations of IDSM's which require a decision to be made within forty days from the complaint. *See* 16 C.F.R. § 703.5(d) (1984).

81. *See* TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07 (Vernon Supp. 1985) (provides purchaser using provisions of § 6.07 with trial *de novo* after exhaustion of administrative remedies in action only against manufacturer or distributor; not dealer); *see also Administrative Procedure and Texas Register Act,* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(c) (Vernon

provision providing a trial *de novo* for the manufacturer; therefore, evidence of the Commission's decision is admissible in evidence if the manufacturer requests judicial review.[82]

## V. THE CONSTITUTIONAL ATTACK OF *CHRYSLER V. TEXAS MOTOR VEHICLE COMMISSION*[83]

One year after the Texas Lemon Law was approved, the Chrysler Corporation filed an action in the Federal District Court for the Western District of Texas, requesting a declaratory judgment that section 6.07 of the Texas Motor Vehicle Commission Code violates the due process and equal protection clauses of the fourteenth amendment, and the supremacy clause of article VI of the United States Constitution.[84] Upon cross motions for summary judgment, Judge Nowlin declared the Lemon Law unconstitutional and permanently enjoined its enforcement.[85] The statute was declared unconstitutional on two separate grounds.[86] First, the differential treatment afforded car owners and manufacturers in the review procedure of the Commission's decision was held to lack a rational basis and therefore deprived manufacturers of due process and equal protection.[87] Second, since the court found

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Supp. 1985) (if manner of review authorized is by trial *de novo,* court "may not admit in evidence the fact of said agency action or the nature of that action").

82. *See* TEX. REV. CIV. STAT. ANN. art. 4413(36), § 7.01(a)(d) (Vernon 1976) (*either party* may appeal within thirty days of Commission's final decision in District Court of Travis County; issue will be whether Commission's decision is invalid, arbitrary, or unreasonable).

83. No. 83-641 (W.D. Tex. June 12, 1984), *rev'd,* 755 F.2d 1192 (5th Cir. 1985).

84. Chrysler v. Texas Motor Veh. Comm'n, No. 83-641, slip op. at 1 (W.D. Tex. June 12, 1984), *rev'd,* 755 F.2d 1192 (5th Cir. 1985). Chrysler also requested that the Motor Vehicle Commission be permanently enjoined from enforcing the lemon statute. *See id.*, slip op. at 1.

85. *See id.,* slip op. at 4-5 (judgment based on Memorandum Opinion and Order).

86. *See id.,* slip op. at 1-2. Chrysler's third ground, that the federal Magnuson-Moss Act, 15 U.S.C. § 2301 *et seq.* (1979), preempts the state's lemon law by virtue of the supremacy clause, U. S. CONST. art. VI, was found to be without merit. *See id.,* slip op. at 4. Section 2311(b)(1) of the Act states that "nothing in this chapter shall invalidate or restrict any right or remedy of any consumer under any state or under any federal law." *See id.,* slip op. at 4 (citing 15 U.S.C. § 2311(b)(1) (1979)).

87. *See id.,* slip op. at 2-3. A purchaser who initiates a proceeding under the Lemon Law and receives *either* a favorable or unfavorable decision before the Commission may pursue a *de novo* action in court. *See* TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07(e) (Vernon Supp. 1985) (requirement only that purchaser exhaust all administrative remedies before pursuing *de novo* action; no requirement he first receive unfavorable decision before the Commission). The purchaser may therefore disregard a favorable decision and bring a *de novo* action using the § 6.07 presumptions, and in addition, recover possible treble damages and attorney's fees under the DTPA. *See id.* § 6.07(e) ("Chapter 17" refers to the Texas DTPA). A manufacturer, however, upon an unfavorable decision, is not only restricted to judicial review of the Commission's order, but must also comply with the order immediately becuse petition for judicial review does not automatically stay the order. *See Administrative Procedure and Texas Register Act,* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(b)(3) (Vernon Supp. 1985) (peti-

dealers to have both a substantial pecuniary and institutional interest in the adjudication of the manufacturer-purchaser warranty disputes, the fact that five of the nine Commissioners are required to be dealers was held to deny manufacturers due process.[88]

The United States Court of Appeals for the Fifth Circuit, however, after a thorough analysis of the Texas Lemon Law procedure, found no violation of any constitutional right of automobile manufacturers and reversed the district court's finding that the statute was unconstitutional.[89]

### A. *The Constitutionality of the Texas Lemon Law's Administrative Review Procedure Which Affords Differential Treatment for Manufacturers and Purchasers*

In upholding the constitutionality of the administrative review procedure, the Fifth Circuit initially rejected Chrysler's argument that the absence of automatic supersedeas renders the Commission's order, in practice, unappealable and thus denies manufacturers due process.[90] The court found

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tion for review does not affect enforcement of agency decision). Therefore, noncompliance might subject the manufacturer to the risk of losing its business license under TEX. REV. CIV. STAT. ANN. art. 4413(36), § 4.06(a)(3) (Vernon Supp. 1985) (Commission may revoke or suspend outstanding license for failure to comply with Act "or any rule promulgated by Commission"). Fines of up to one thousand dollars per day for noncompliance under § 6.01 may be levied. *See id.* § 6.07(e). The court found that the Commission's decision in a § 6.07 action is "in practice unappealable" for manufacturers and thus denies them due process. Chrysler v. Texas Motor Veh. Comm'n, No. 83-641, slip op. at 1 (W.D. Tex. June 12, 1984), *rev'd*, 755 F.2d 1192 (5th Cir. 1985). The Commission's contention that there was no serious threat of license revocation or fines was found immaterial since even the possibility of those sanctions being imposed "places the manufacturer in a constitutionally untenable situation." *See id.*, slip op. at 3. The court further held that this unequal burden upon the manufacturer's ability to obtain judicial review has no rational basis, thus denying manufacturer's due process and equal protection. *See id.*, slip op. at 2.

88. *See id.*, slip op. at 3-4. The court found dealers to have an institutional interest in finding for purchasers thereby ensuring that manufacturers carry the burden of warranty claims. *See id.*, slip op. at 3-4. The pecuniary interest is had when manufacturers bear the costs of satisfying the customers claims. *See id.*, slip op. at 4.

89. Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1192 (5th Cir. 1985) (opinion written by Patrick E. Higginbotham, Circuit Judge). The court affirmed the district court's finding that the lemon law is not preempted by the Magnuson-Moss Warranty Act. *See id.* at 1194.

90. *See id.* 1196-1200 (5th Cir. 1985). Chrysler claims that the absence of an automatic stay of the Commission's order pending appeal subjects the manufacturer to such a risk of penalty so as to force compliance of the order. *See* Brief of Appellee at 11-13, n.15, Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1195 (5th Cir. 1985). Any appeal would, therefore, become moot since a successful manufacturer thereafter faces a difficult task of recovering the amount paid to the purchaser. *See id.* at 11-13. Chrysler argued that this burden placed on the manufacturer's right to appeal is sufficient in itself to violate their right to due process. *See id.* at 11-13.

Texas' customary use of temporary injunction to restrain enforcement of agency decisions sufficient to provide supersedeas and, therefore, found no violation of due process.[91] The court then turned to Chrysler's claim that the difference in treatment of manufacturers and purchasers for purposes of appellate review of the Commission's decision violates due process and equal protection.[92] The court found the appropriate standard for judicial review of the legislative classification between manufacturers and purchasers was whether the classification is rationally related to a valid state objective.[93] The mere fact that procedural rights are involved was not found to justify a higher standard of judicial review which would result in an inappropriate intrusion into the weighing of economic objectives and values.[94] Since wealth is not a suspect criterion it could not necessitate the more rigorous review suggested by Chrysler.[95]

Finally, the court determined that the differential treatment afforded man-

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91. *See* Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1192, 1200 (5th Cir. 1985). The court pointed out that the petition for temporary injunction is the same method of supersedeas used in review of many Texas agency orders including the Texas Public Utility Commission, the Texas Board of Insurance, the Texas Railroad Commission, whose orders have an even greater impact and usually involves a much greater amount of money. *See id.* at 1200. The court ruled that although Texas could have chosen a "more traditional appellate scheme," there is no showing that this method of supersedeas has worked a hardship on litigants in the past. *See id.* at 1200; *see also* Brief of Amicus Curiae, The Legal Foundation of America at 7, Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1192 (5th Cir. 1985) (although a more logical approach would be a statutory provision for supersedeas, fact that Texas uses temporary injunctions to stay administrative orders, does not render procedure unconstitutional).

92. *See* Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1192, 1200-01 (5th Cir. 1985). The court conceded that "in the broadest sense of 'appellate review,' " manufacturers and purchasers are treated differently for purposes of judicial review. *See id.* at 1201.

93. *See id.* at 1200-01. The court rejected Chrysler's suggestion of a need for a higher standard of review because the legislative classification of purchasers and manufacturers affects matters of procedural rights and also discriminates against a near-suspect class, wealth. *See id.* at 1200-01.

94. *See id.* at 1200-01. In suggesting a heightened standard for judicial review because procedural matters were involved, Chrysler relied on Justice Harlan's concurring opinion in *In re Gault,* which asserts that courts have "particular responsibility" for procedural due process and legislatures should expect only a "cautious deference for their procedural judgments". *See* Brief of Appellee at 8, Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1195 (5th Cir. 1985) (citing *In re Gault,* 387 U.S. 1, 70-71 (1967)). The court rejected Chrysler's theory since legislative economic decisions and policy are often, and of necessity, expressed in procedural terms. *See* Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1192, 1201-02 (5th Cir. 1985).

95. *See* Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1192, 1202-03 (5th Cir. 1985). Wealth was rejected as a suspect class in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), and the court here also refused to add it to the "suspect list" by analogizing its relationship to other suspect classes. *See id.* at 1202-03. The court then found that deference must be accorded the legislature here as "the Fourteenth Amendment gives the

ufacturers and purchasers is rationally related to valid state objectives.[96] The Texas Legislature was entitled to encourage lemon owners to use the extrajudicial warranty dispute resolution system by providing that it can be used without prejudice.[97] The legislature was also entitled to deal with the limited class of car purchasers who are unevenly matched against the class of manufacturers who are much better equipped to handle extensive litigation.[98] The court also noted the marked difference in economic stakes between the two classes of litigants.[99] Manufacturers have a greater interest in successfully defending lemon claims in order to protect the reputation of their product; while on the other hand, car owners are not likely to expend a greater amount on litigation than the initial price of their car.[100] Therefore, in abiding by the equal protection command that similarly situated persons be treated similarly in areas of legislative classifications, Texas is correct in recognizing that automobile purchasers and manufacturers are not similarly situated in litigating warranty disputes.[101] Thus, Texas has valid objectives in attempting to balance the economic interests of the two classes of litigants

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federal courts no power to impose upon the states their views of what constitutes wise economic or social policy." *Id.* at 1202 (citing Danridge v. Williams, 397 U.S. 471, 486 (1970)).

96. *See id.* at 1202.

97. *See id.* at 1203. By conditioning the availability of the § 6.07 benefits upon submission before the Commission for hearing, Texas is clearly attempting to encourage the purchasers' use of the administrative forum to resolve their warranty disputes. *See id.* at 1203. Texas is also entitled to provide that its use is without prejudice, since a purchaser might not otherwise be as likely to submit his claim to the Commission if his claim will later be prejudiced as a result. *See id.* at 1203; *see also* Brief of Appellant at 6-7, Chrysler v. Texas Motor Veh. Comm'n, 755 F.2d 1192 (5th Cir. 1985) (Texas has a valid interest in encouraging the use of an inexperienced, more efficient dispute resolution system which helps relieve the crowded court dockets).

98. *See* Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1192, 1202 (5th Cir. 1985). The court notes the reality that as between the manufacturer and purchaser, the party more likely to suffer hardship and loss of income during the pendancy of litigation will be the purchaser, who also has his assets tied up in the lemon car. *See id.* at 1202.

99. *See id.* at 1202. . This point was very effectively propounded by *amicus curiae. See* Brief of Amicus Curiae, The Legal Foundation of America at 11-13, Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1192 (5th Cir. 1985).

100. *See* Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1192, 1203 (5th Cir. 1985); *see also* Brief of Amicus Curiae, The Legal Foundation of America, Chrysler v. Texas Motor Veh. Comm'n, 755 F.2d 1192 (5th Cir. 1985). In addition, *amicus curiae* cites a very effective illustration in support of the hypothesis that "plaintiffs are psychologically predisposed to seek settlement and defendants are psychologically predisposed to resist settlement in favor of trial." *See id.* (citing G. Williams, Legal Negotiation and Settlement 130 (1983) (West Pub. Co. Text)).

101. *See* Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1192, 1203 (5th Cir. 1985). The court treated Chrysler's argument that the procedure used must treat parties equally and without regard to characteristics such as economic status as a "specific application" of the requirement that similarly situated persons be treated similarly and rejected its application here since manufacturers and purchasers are not similarly situated. *See id.*

who are unevenly matched[102] and in encouraging the purchaser's use of the administrative procedure to resolve his lemon claims before initiating an action in court.[103]

### B. *The Constitutionality of the Make-Up of the Texas Motor Vehicle Commission's Majority Dealer Membership*

In upholding the constitutionality of the Texas Lemon Law, the Fifth Circuit also rejected Chrysler's claim that the composition of the Commission, the majority of whom are dealers, denies manufacturers due process in that dealers have a substantial pecuniary and institutional interest in deciding against manufacturers.[104] The proper test in determining whether an adjudicator of facts is impermissibly biased against a class of litigants, so as to constitute a denial of due process, is whether the facts present a "possible temptation to the average man as a judge" towards partiality.[105] After a survey of the cases dispositive of this issue,[106] the court recognized that

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102. *See id.* at 1203. The court notes that Supreme Court cases recognize the state's duty to "equalize access to the courts by assisting the poor." *See id.* at 1203. The court also points out that "much of tort law rests on such economic adjustments and legislative assumptions about economic incentives and allocative efficiencies." *See id.* at 1203.

103. *See id.* at 1203. Therefore, since the legislative classificiations of the lemon law are rationally related to these valid state objectives, the differential treatment afforded manufacturers and purchasers does not deny manufacturers due process nor equal protection. *See id.* at 1203.

104. *See id.* at 1197-99. Chrysler argued that by finding for the purchasers in the manufacturer-purchaser warranty disputes, the dealers are benefitted in many ways. *See* Brief of Appellee at 16-28, Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1192 (5th Cir. 1985). By satisfying the purchaser's warranty claim, which might have otherwise been directed at the dealer, they effectively draw the "legal fire away from themselves" and, furthermore, by setting a precedent of successful purchaser recovery under § 6.07, they encourage future lemon claimants to seek their remedies against the manufacturer under this provision and not against the dealers under traditional remedies. *See id.* at 22. The district court found this interest to be the "institutional interest" which dealers had in deciding in favor of car buyers. *See* Chrysler Corp. v. Texas Motor Veh. Comm'n, No. 83-641, slip op. at 3-4 (W.D. Tex. June 12, 1984), *rev'd*, 755 F.2d 1192 (5th Cir. 1985). The "pecuniary interest" was found to be the dealer's benefit of customer satisfaction and goodwill at the expense of the manufacturer. *See id.*, slip op. at 4. Finally, Chrysler argued that dealers have a substantial interest in finding the car to be defective rather than, in the alternative, admitting that the problem lies with their own mechanics who cannot perform effective repairs. *See* Brief of Appellee at 24, Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1192 (5th Cir. 1985).

105. *See* Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1192, 1198 (5th Cir. 1985). Therefore, the fairness of the procedure is not measured by whether the "man of highest honor and the greatest self-sacrifice" would be tempted toward partiality. *See id.* at 1198. This test is derived from the landmark case of *Tumey v. Ohio* which found a denial of due process when a litigant is subjected to the "judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *See* Tumey v. Ohio, 273 U.S. 510, 523 (1926).

106. *See* Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1192, 1198-99 (5th Cir.

while the economic interest or related bias in question need not be direct, the immediacy of the interest is measurable on a "continuum of interests" ranging from a judge who is paid only upon convictions, to the most disinterested and wholly impartial justice, and thus, a line must be drawn for "cases at the edge."[107]

Here, Chrysler claimed that the dealer members of the Commission are substantially benefitted in finding for purchasers in their lemon claims against manufacturers in that: (1) manufacturers are made to sustain the burden of warranty claims which would otherwise be directed at the dealers under traditional remedies, (2) dealers gain the benefit of customer satisfaction at the manufacturer's expense, and finally (3) manufacturers carry the blame for car problems as being the result of defective design rather than blame being attached to the dealer's ineffective repairs.[108] The court, however, found the "predictors of bias" to "point in opposite directions" since speculations can be equally made in favor of the dealers' partiality toward manufacturers.[109] Given the competitive relationship that exists between dealers, one dealer might be naturally predisposed to find that the fault lies with another competitive dealer.[110] Also, the dealers stand to lose each time a car of the same make which they sell is branded a lemon.[111] In response to Chrysler's claim that dealers effectively divert warranty claims from themselves by finding for purchasers, the court pointed out that while dealers are

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1985). In *Tumey v. Ohio,* a village ordinance which provided that the judge of liquor violations was only to be paid in cases which resulted in conviction was struck as a denial of due process. *See* Tumey v. Ohio, 273 U.S. 510, 523 (1926). Ruling that the interest in question need not be direct, the Court in *Ward v. Village of Monroeville* found a violation of due process where the village derived a large part of its revenues from fines and costs imposed by the mayor's court. *See* Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972). However, where a city was not governed solely by a mayor but also by five commissioners and a city manager who exercised all executive functions, the Court found the relationship between the city's revenues and the mayor's court too remote. *See* Dugan v. Ohio, 277 U.S. 61, 64 (1928). Once again an indirect financial interest was found to result in a violation of due process in *Gibson v. Berryhill,* where a state board of optometry composed *only* of private practitioners adjudicated complaints directed at corporate employed optometrists, the elimination of whom would effectively wipe out more than half of the private practitioner's competition. *See* Gibson v. Berryhill, 411 U.S. 564, 578 (1972).

107. *See* Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1192, 1199 (5th Cir. 1985). The immediacy of the economic interest cannot be measured in definite, objective terms but rather must be determined on a case-by-case basis. *See id.* at 1198.

108. *See id.* at 1198.

109. *See id.* at 1199.

110. *See id.* at 1199.

111. *See id.* at 1199. Another equally plausible speculation advanced by the state is that dealers would favor their own manufacturer with whom they have an ongoing relationship and who is essential to their continued existence as dealers. *See* Brief of Appellant at 9, Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1192 (5th Cir. 1985) (arguing that the bias perceived by Chrysler rests on a "dubious chain of inferences").

allowed to disclaim warranties made by manufacturer to purchaser, they may still be sued for negligent repair regardless of the outcome of the claim against the manufacturer.[112] Since mere inferences of bias both ways tend to contradict the claim that partiality exists, the court found speculations which "tumble against each other" do not support a finding of bias sufficient to constitute a denial of due process.[113]

## VI. THE TEXAS LEMON LAW CONFORMS WITH THE UNDERLYING GOAL OF WARRANTY REGULATION IN THAT IT EQUALIZES THE IMBALANCE BETWEEN TWO PARTIES WHO ARE NOT SIMILARLY SITUATED

The very essence of warranty regulation laws is to "redress the ill effects resulting from the imbalance which presently exists in the relative bargaining power of consumers and suppliers of consumer products."[114] This is the goal of the Texas Lemon Law.[115] The legislature sought to equalize the relative positions of the purchaser and the manufacturer by providing both a definitive cause of action and also an inexpensive and effective dispute resolution system.[116] The constitutional attack of *Chrysler v. Texas Motor Vehicle Commission* stems from the uniqueness of the Texas Lemon Law's dispute resolution system in that manufacturers and purchasers are treated differently.[117] However, to provide for an effective dispute resolution system, purchasers must necessarily be treated more favorably than manufacturers in order to equalize the disparity between the two parties.[118] It is this

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112. *See* Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1192, 1195 (5th Cir. 1985) (negating claim that dealers are able to find for purchasers and thus absolve themselves of all liability).

113. *See id.* at 1195. Not only was the possibility of temptation found without merit, the court also found significance in the fact that four of the nine commissioners are not dealers, but consumers, and decisions are made by the whole commission and not only by a few members. *See id.* at 1195.

114. SENATE COMM. ON COMMERCE, REPORT ON MAGNUSON-MOSS WARRANTY-FEDERAL TRADE COMMISSION IMPROVEMENT ACT, S. Rep. No. 93-151, 93rd Cong., 1st Sess. 2 (1973).

115. *See Hearings on Tex. S.B. 1411 Before the Senate Comm. on Economic Development,* 68th Leg. 4 (April 20, 1983) (purpose of lemon law to redress grievances of lemon owners who have suffered at hands of indifferent manufacturers).

116. *See id.* at 4, 14.

117. *See* Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1192, 1199-1200 (5th Cir. 1985).

118. *See* Jones & Boyer, *Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies,* 40 GEO. WASH. L. REV. 357, 400-10 (1972) (consumer at disadvantage when faced with manufacturer's more informed representative; even most articulate layman has difficulty in determining what is relevant and presenting it in persuasive manner); Leff, *Injury Ignorance and Spite — The Dynamics of Coercive Collection,* 80 YALE L.J. 1, 20-22 (1970) (warrantor acts rationally by delaying resolution of warranty disputes since it becomes

underlying element that the Fifth Circuit recognized when it reinstated the Texas Lemon Law.[119]

The virtue of Texas' unique procedure for dispute resolution is clearly illustrated when compared with the IDSMs provided for by other states' lemon laws and the problems inherent in those mechanisms. First of all, while the requirements for these dispute settlement mechanisms are designed to minimize the bias of panel members,[120] the extent of impartiality that can exist when the members owe their employment on the arbitration board to the manufacturer has been seriously questioned.[121] The evidence presently available, "suggests that the make-up of arbitration panels works against consumers."[122] The federal requirement of no direct manufacturer involvement through the panel members does not necessarily mean that there is no bias in favor of the manufacturer/employer.[123] Presumably, the dissatisfied consumer should be consoled by the fact that since the decision is not bind-

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too costly for many consumers to pursue their remedy); *cf.* Note, *Consumer Product Warranties under the Magnuson-Moss Warranty Act and the Uniform Commercial Code,* 62 CORNELL L. REV. 738, 740 (1977) (stricter obligations need to be imposed on party with greater bargaining power to compensate for consumer's ignorance).

119. *See* Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1192, 1202 (5th Cir. 1985) (Texas entitled to deal with "reality that the manufacturer with its resources for litigation" enjoy significant advantage over consumer who is only able to pursue his claim "as long as his purse and his patience endure").

120. *See* 16 C.F.R. § 703.3(b) (1984) (warrantor/sponsor must take steps necessary to insure mechanism members not influenced by warrantor including "committing funds in advance, basing personnel decisions solely on merit, and not assigning conflicting warrantor or sponsor duties to mechanism staff persons").

121. *See* Rigg, *Lemon Laws Should be Written to Ensure Broad Scope and Adequate Remedies,* 17 CLEARINGHOUSE REV. 302, 309 & n.80 (1983) (panel members can be fined by manufacturer if members "too aggressive"; FTC regulations that panel members not be biased impossible to enforce unless in cases of clear abuse); Note, *Incentives for Warrantor Formation of Informal Dispute Settlement Mechanisms,* 52 S. CAL. L. REV. 235, 239 n.33 (1978) (suggests steps to make dispute settlement mechanisms free from bias on part of panel members).

122. *See* Rigg, *Lemon Laws Should be Written to Ensure Broad Scope and Adequate Remedies,* 17 CLEARINGHOUSE REV. 302, 309 n.79 (1983); *see also* Note, *A Sour Note: A Look at the Minnesota Lemon Law,* 68 MINN. L. REV. 846, 874 n.146 (1984) (citing *Car Owner's Gripes Getting Industry Ear,* MPLS. STAR. & TRIB. at B4, col. 1 (July 4, 1983)). Of the cases decided by Ford's five year pilot dispute settlement mechanism program, sixty-three percent favored the manufacturer or dealer. *See id.* at 874 n.146.

123. *See* Rigg, *Lemon Laws Should be Written to Ensure Broad Scope and Adequate Remedies,* 17 CLEARINGHOUSE REV. 302, 309 (1983). Since the Texas Lemon Law provides for hearing before a state agency, and a neutral arbitrator, the danger of partiality towards the employer/manufacturer does not exist as it does when a manufacturer-sponsored arbitration mechanism is used. *See* TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07(e) (Vernon Supp. 1985). Similarly, the Vermont Lemon Law provides for a state-run arbitration board to conduct hearings if the consumer elects this alternative instead of the manufacturer's mechanism. *See* VT. STAT. ANN. tit. 9, § 4174(a) (Supp. 1985). *See generally* Rigg, *Lemon Laws Should be Written to Ensure Broad Scope and Adequate Remedies,* 17 CLEARINGHOUSE REV. 302, 309

ing, he may subsequently resort to traditional litigation.[124] Although the decision is nonbinding, it is admissible as evidence in any subsequent suit arising out of the same warranty obligation.[125] Consumers, therefore, who are dissatisfied with the decision rendered by a possibly biased arbitration panel, face "uphill and more expensive battles in persuading the court that they have good cases."[126]

Furthermore, even if the consumer does receive a satisfactory decision from the arbitration mechanism, the manufacturer is only bound to exercise "good faith" in deciding whether to abide by the mechanism's decisions.[127] The arbitration provision, therefore, becomes counter-productive in that it operates to unnecessarily delay the consumer's ultimate relief under the lemon laws.[128] The manufacturer, who has nothing to gain by an expeditious settlement, is at a considerable advantage over the consumer whose money is invested in the lemon and who is without transportation during the entire process.[129] It is not surprising that consumer dispute settlement mechanisms like these, which do not possess effective sanctions against the

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(1983) (advocates arbitration members be made "accountable to the public and not to the manufacturer" in order to prevent bias towards manufacturer).

Although in *Chrysler Corp. v. Texas Motor Veh. Comm'n,* the make-up of the Commission's membership was upheld as constitutional, this author advocates extending application of the recusal provision of § 3.04(j) to § 6.07 which would disqualify dealers from participating in disputes wherein their own manufacturer or distributor was involved. *See* TEX. REV. CIV. STAT. ANN. art. 4413(36), § 3.04(j) (Vernon Supp. 1985). This is asserted in light of the substantial interest a dealer would have in deciding in favor of his manufacturer with whom he has an ongoing relationship and who is essential to his continued existence as a dealers. *See* Brief of Appellant at 9, Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1192 (5th Cir. 1985).

124. *See* 16 C.F.R. § 703.5(j) (1984) (mechanism's decisions not binding on any party; therefore, consumer may pursue traditional litigation).

125. *See id.* § 703.5(g)(2) (mechanism's decision admissible in evidence). *But see* Smith v. Universal Services, 454 F.2d 154, 157 (5th Cir. 1972) (although decision reached by dispute settlement mechanism admissible, Act fails to specify weight it should be accorded); *see also* Strasser, *Magnuson-Moss Warranty Act: An Overview and Comparison with U.C.C. Coverage, Disclaimers and Remedies in Consumer Warranties,* 27 MERCER L. REV. 1111, 1139 (1976) (admission of mechanism's decisions will encourage parties to dispute partiality of result reached as well as to litigate merits).

126. *See* Rigg, *Lemon Laws Should be Written to Ensure Broad Scope and Adequate Remedies,* 17 CLEARINGHOUSE REV. 302, 309 (1983).

127. *See* 16 C.F.R. § 703.5(j) (1984). *But see* CAL. CIV. CODE § 1793.2(e) (West 1984) (makes mechanism's decision binding on warrantor but not on consumer).

128. *See* Note, *A Sour Note: A Look at the Minnesota Lemon Law,* 68 MINN. L. REV. 846, 875 (1984) (mandatory requirement of submission before a dispute settlement mechanism restricts consumers rights by barring them from pursuing immediate relief).

129. *See* Note, *Incentives for Warrantor Formation of Informal Dispute Settlement Mechanisms,* 52 S. CAL. L. REV. 235, 236 (1978) (warrantors stand to gain considerably by prolonging litigation in hopes consumers, who cannot afford extensive litigation, will drop out).

manufacturers, are regarded by consumers as mere "window dressing."[130] The Texas Lemon Law, however, successfully avoids these problems by providing for an independent state agency to resolve disputes, by making the Commission's decision binding on the manufacturer so that the arbitration proceeding does not result in a "useless thing," and by providing the purchaser with a *de novo* action so as to encourage use of the resolution system.[131]

Since warranty dispute resolution systems benefit not only the purchaser but also the manufacturer, the Texas Lemon Law serves another purpose in encouraging the purchaser's use of the extrajudicial proceeding by providing that its use is without prejudice.[132] By conditioning the beneficial provisions of the Texas Lemon Law upon mandatory submission to the administrative hearing, the manufacturer is given a chance to attempt a compromise with the purchaser.[133] The purchaser who receives an unfavorable decision from the Commission might accept a lower settlement from the manufacturer instead of pursuing a court action which would entail further delay and expense in the hopes of recovering a slightly larger settlement.[134] Therefore,

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130. *See* Jones & Boyer, *Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies,* 40 GEO. WASH. L. REV. 357, 381 (1982) (lack of effective sanctions against manufacturer reason why consumers regard such dispute settlement mechanism as useless).

131. *See* TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07 (Vernon Supp. 1985).

132. *See id.* § 6.07(e) (provides purchaser with *de novo* action); *see also* Brief of Appellant at 6-7, Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1192 (5th Cir. 1985) (state also serves its own interests by encouraging purchaser's use of extrajudicial dispute resolution system in that its use relieves crowded court dockets).

133. *See Debate on Tex. H.B. 2211 on the Floor of the House,* 68th Leg. (May 17, 1983). This is implicit in the fact that Rep. Price's amendment which would have made submission before the Commission optional and not a mandatory prerequisite to an action under the lemon law, was rejected. *See id. See generally* Note, *Sweetening the Fate of the "Lemon" Owner: California and Connecticut Pass Legislation Dealing with Defective New Cars,* 14 TOLEDO L. REV. 341, 364-65 (1983) (automotive industry removed its opposition to California lemon bill when provision requiring submission to dispute resolution mechanism was included).

134. *See* TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07 (Vernon Supp. 1985) (includes no provision for recovery of collateral charges, attorney's fees and treble damages that car owner could possibly otherwise recover in a successful court action under TDTPA); *see also Debate on Tex. H.B. 2211 on the Floor of the House,* 68th Leg. (May 17, 1983) (proposed amendment to include mandatory recovery of collateral charges was rejected in order to allow Commission discretion in deciding what amount should be recovered). The Fifth Circuit in *Chrysler* recognized the warranty dispute resolution forum as a "limited claim route where a manufacturer faces much less exposure and a successful purchaser's claims will likely end." *See* Chrysler Corp. v. Texas Motor Veh. Comm'n, 755 F.2d 1192, 1202 (5th Cir. 1985). *See generally* Note, *Sweetening the Fate of the Lemon Owner: California and Connecticut Pass Legislation Dealing with Defective New Cars,* 14 TOLEDO L. REV. 341, 373 (1983) (predicts that "most lemon cases brought to arbitration will be settled without complete replacement or refund by the manufacturer").

since the purchaser's use of the administrative procedure is also to the manufacturer's substantial advantage, its use should not be discouraged by attaching prejudice to the resulting decision.

## VII. CONCLUSION

Traditionally, lemon owners have had many obstacles to overcome in order to recover. The consumer's burden of abrogating the manufacturer's limited remedy of repair or replacement of defective parts before entitlement to any other remedy is just one obstacle among many. As a result, lemon laws were enacted to redress the grievances of defective car owners.

Although the Texas Lemon Law is in substance much like those in other states, its mechanism for effective dispute resolution is distinct. In essence, the Texas Motor Vehicle Commission is an effective alternative to the heavily criticized informal dispute settlement mechanisms sponsored by manufacturers. First, there is no risk of a panel member's partiality toward an employer/manufacturer. Also, the Commission possesses effective sanctions against the manufacturer so that submission to the arbitration procedure will not be regarded by the consumers as a "useless thing" established only for the purpose of delay. Even though its use is mandatory before the consumer may use the beneficial provisions of section 6.07, the purchaser is not discouraged from using the arbitration procedure since his right to a *de novo* action is preserved in the event of dissatisfaction. Finally, the Commission does not force the consumer to travel long distances just to present his case in person.

The preservation of the purchaser's *de novo* cause of action is rationally related to the state's valid interest of encouraging purchasers to submit to the dispute resolution system, provided by the Commission, which enures to the benefit of all involved: state, purchaser, and manufacturer. Fortunately, for Texas lemon owners, the Fifth Circuit recognized that the differential treatment afforded manufacturers and purchasers under the Texas Lemon Law conforms with the purpose of warranty regulation in general by equalizing the disparity between two parties who are not similarly situated, and therefore, does not deny manufacturers due process or equal protection.