

LAW AND THE CONSUMER TRANSACTION: A CASE STUDY OF THE AUTOMOBILE WARRANTY†

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Many people have made suggestions about what is the "best" approach to consumer protection regulation. However, Professor Whitford thinks that there has not been enough thought given to the relative effectiveness of these suggested approaches. In his article Professor Whitford analyzes the effectiveness of various approaches for consumer protection regulation of one particular consumer transaction and considers the effectiveness and other factors that together determine the most appropriate type of regulation.

I. INTRODUCTION

Protection of the consumer in his contractual transactions with businessmen is an area of contemporary judicial and legislative concern. Everyone now agrees that the common law rules of contract inadequately protect the consumer's legitimate interests. Yet there is no consensus on what specific reforms must or should be made in the legal system.

Currently, a number of approaches to consumer protection regulation are in use. There is increasing regulation of the production processes for consumer goods, usually by providing minimum standards of quality and often by establishing a system for inspecting the output. Food and drug products are particularly likely subjects of this type of regulation. The terms of many consumer contracts

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—for example, insurance contracts—are directly regulated by prescribing or proscribing certain terms. Sometimes the terms that are prescribed or proscribed are stated in statutes or administrative orders;¹ other times courts are relied upon to strike contract provisions they consider undesirable.² Where courts are relied on for enforcement of this type of regulation, there have been efforts to encourage more consumers to use them, often by reducing the cost of litigation.³ In other instances the necessity that consumers sue to invoke the enforcement process has been bypassed by subjecting undesirable seller conduct to criminal sanction or by establishing administrative agencies to search out illegal practices and bring them to a court's attention.⁴ A third and very common approach to consumer protection regulation is to require sellers to convey notice of contract provisions to consumers in the hope this will induce many to refuse to enter contracts that are too unfavorable. Regulation of labeling and advertising are good examples of this approach.

A number of considerations determine what type of consumer protection regulation to use. Freedom of contract is still an influential value in determining the nature of the regulation of even consumer contracts, and consequently there is considerable disagreement about how freely arrangements established by private parties can be forcibly revised. There is also disagreement about the directions in which regulation should try to shape consumer transactions—that is to say, about the requirements for a “fair” consumer contract. Another important consideration is the effectiveness of different techniques of regulation in achieving the goals set out for them. Often these considerations will conflict; the most effective type of regulation may require the most drastic infringements on freedom of contract. It is my belief, however, legal commentators discussing consumer protection regulation have given too little attention to considerations of effectiveness. As a result, we know very little about what determines the relative effectiveness of a particular regulation.

In this article I will analyze some of the elements that determine the effectiveness of different types of consumer protection regulation, and examine some of the conflicts and interrelationships between effectiveness and other factors that determine the appropriate type of regulation. I will do so by examining in detail one

¹ This is a very common form of regulation of fire insurance contracts. See E. PATTERSON, *CASES ON INSURANCE* 764 (3rd ed. 1955).

² E.g., *UNIFORM COMMERCIAL CODE*, § 2-302.

³ The neighborhood legal offices established by the Office of Economic Opportunity are an example of this type of consumer protection regulation. Small claims courts are another.

⁴ See Mindell, *The New York Bureau of Consumer Frauds and Protection—A Review of its Consumer Protection Activities*, 11 N.Y.L.F. 603 (1965).

important consumer transaction—that part of the contract for the sale of a new automobile that consists of the manufacturer's warranty promising repair or replacement of defective material and workmanship.⁵ It is not possible, of course, to generalize from this one example to all consumer protection regulation. Nevertheless, it is necessary to begin the analysis of effectiveness of different types of regulation somewhere, and for that purpose the automobile warranty has advantages as an object of study. The warranty is fairly complex, containing several conditions and limitations on the manufacturer's obligation to repair or replace malfunctioning parts. Consequently there are several provisions that the legal system might wish to control in the consumer's interest. Consumers request a high number of repairs under the warranty, and as a result a fairly complex and highly bureaucratized procedure has developed to dispose of these requests. The complexity of this procedure means that there are many places in the warranty transaction where the law might intervene to insure that the consumer actually receives whatever it is decided he should receive. Finally, several legislative proposals have recently been made that would require much more extensive regulation of the warranty transaction than presently exists.⁶ A study of the warranty will permit evaluation of these proposals.

The sources of information for this case study are varied. There are not many reported court decisions involving disputes under that part of the automobile warranty under study.⁷ Instead, most warranty disputes are settled informally. Therefore, it is necessary to determine the results of this informal dispute settlement in order to identify the changes that consumer protection regulation might attempt to accomplish. Although some information about the informal process was gathered from trade and other publications and from interviews with personnel of public and private

⁵ The manufacturer's warranty not only promises repair or replacement of defective parts in certain circumstances but it also disclaims all other liability concerning the quality of the vehicle sold that would ordinarily be imposed by the law of tort and implied contract. I have examined the effects of this disclaimer clause at considerable length elsewhere, and consequently I will devote little attention to it in this article. See Whitford, *Strict Products Liability and the Automobile Industry: Much Ado About Nothing*, 1968 Wis. L. Rev. 83; notes 80-82 *infra* and accompanying text.

⁶ See notes 155-75 *infra* and accompanying text.

⁷ When an automobile owner does sue a dealer or a manufacturer because of an inability to obtain a satisfactory repair of some defect under the warranty, he usually requests as damages not the monetary expense of repairing the car but either rescission of the sales contract and return of the purchase price or the diminution in the car's value caused by the defect. These cases typically raise, therefore, issues under the disclaimer clause or the related warranty provision limiting the owners remedies for breach of the express warranty to repair or replacement of the defective parts, and consequently I have discussed them in my earlier article. See Whitford, *supra* note 5, at 134-39.

agencies having contacts with warranty administration, the principal source had to be interviews with participants in the process itself. Interviews were conducted with automobile dealers and their service personnel, with representatives of automobile manufacturers and with new car purchasers. The dealers interviewed were all located in Wisconsin and, with one exception, they sold only cars manufactured by General Motors Corporation, Ford Motor Company, and Chrysler Corporation. A few interviews were conducted with dealers for the more expensive makes distributed by the three major manufacturers, but the bulk of the interviews were with dealers of Chevrolet, Ford, and Plymouth.⁸ The dealers interviewed were not selected on a random basis but, within the restrictions just mentioned, some effort was made to interview dealers of all sizes and locales. Moreover, dealers and their personnel have a general knowledge of the automobile industry, and it was often possible to obtain information about how dealers who were not interviewed would act in particular situations. Consequently, I believe the information obtained in the dealer interviews to be generally accurate, at least for Wisconsin dealers of the makes surveyed. The interviews with dealers were not conducted according to a fixed questionnaire, however, and consequently the information obtained from them must be reported in an impressionistic manner. For similar reasons the results of the interviews with representatives of the three major domestic manufacturers will also be reported impressionistically.⁹

⁸ There are several reasons for these restrictions on the types of dealers interviewed. At the time I conducted these interviews, I was living in Madison and it was not practical for me to interview outside Wisconsin. I did interview one American Motors Corporation dealer and no doubt interesting information could have been obtained if I had included more of them in my sample. Limited sources forced me to limit the number of interviews, however, and so I decided to concentrate on the three major manufacturers in an effort to learn as much about them as possible. Most of the interviews were further restricted to dealers of Chevrolet, Ford and Plymouth makes, all of which fall roughly in the same price range, in order to permit more precise determination of the differences in the patterns of informal dispute settlement that could be attributed to the different warranty administration practices adopted by the three major manufacturers. Inclusion of many interviews with dealers of more expensive makes, and a consequent reduction in the number of interviews with Chevrolet, Ford and Plymouth dealers, would have made this determination less precise, partly because the price of the new car may itself be an important determinant of warranty administration practices and partly because the warranties on the more expensive makes of each manufacturer are administered by different bureaucratic divisions than those assigned the cheaper makes.

⁹ Many of my dealer and manufacturer informants requested anonymity and consequently the sources of most of the information reported from these interviews must remain unidentified. Because there is little difference between the manufacturers and dealers for many of the major features of warranty administration, in this article I will frequently refer to the practices of the manufacturers and dealers generally. Where I have col-

The interviews with new car purchasers were designed not only to learn about informal dispute settling practices from a purchaser's point of view but also to help gather information about certain other aspects of the warranty transaction—principally, the purchaser's knowledge about his rights and obligations under the warranty contract. Because individual new car purchasers are likely to vary substantially in their experiences in dispute settlement and in the other characteristics included in this study, it was necessary to conduct a large number of interviews in order to obtain a reasonably accurate impression of typical consumer experiences.¹⁰ Accordingly, 329 persons, all of them recent new car purchasers residing in southern Wisconsin, were selected on a random basis, with 286 of them actually being interviewed, and their answers were quantified.¹¹ The sample was drawn from lists of persons who purchased new Fords, Chevrolets, or Plymouths and registered them with the Wisconsin Department of Motor Vehicles between December 15, 1966 and January 31, 1967.¹² The sample was strati-

lected enough evidence to support substantially a finding of a difference in the practices between the manufacturers or between types of dealers, I have tried to be faithful in reporting it.

¹⁰ The survey was conducted by the University of Wisconsin Survey Research Laboratory, whose trained staff advised and assisted in the selection of the sample, preparation of the questionnaire, and the coding and analysis of the results. The Survey Research Laboratory maintains a staff of trained interviewers throughout Wisconsin. It was these interviewers who actually administered the questionnaire to each respondent. All questions were asked orally with the interviewer recording the respondent's answer.

¹¹ The resulting response rate of 87% is generally considered good. Of course, the nonresponses represent error in any attempt to use the results of the survey to estimate the characteristics of the entire population of new car buyers. The magnitude of this error cannot be estimated precisely. Cf. Birnbaum & Sirken, *Bias Due to Non-Availability in Sampling Surveys*, 45 J. AM. STATISTICAL ASS'N 98 (1950). Consequently, when in the subsequent text estimates are made about the characteristics of the population of Wisconsin car purchasers, it would be more accurate to state that the estimates pertain to that part of the population who will respond to surveys of this type.

The nonresponses were distributed approximately equally among purchasers of the various makes and from the various locales sampled. There were nonresponse ratios of about 20%, however, among Plymouth owners residing in Milwaukee and Chevrolet owners residing in medium sized cities. For an explanation of how the sample was stratified, see the subsequent text discussion.

Of the total of 43 nonresponses, 25 were located but refused to be interviewed. Most of the balance of the nonresponses could not be located and were not interviewed for that reason.

¹² Ford, Chevrolet, and Plymouth automobiles were defined as any vehicle classified under that make by the Wisconsin Department of Motor Vehicles. The department classifies many different models under each make. Thus, a "Mustang" is classified as a Ford, and an "Impala" is classified as a Chevrolet. Consequently, with each make are included many different types of automobiles which differ substantially in style and price. It is to be expected, therefore, that the purchasers of each make will vary

fied so that approximately an equal number of purchasers of each of the three makes were interviewed. The sample was also stratified according to the type of locale in which the purchaser resided. One third of the purchasers selected for each make resided in Milwaukee, the only city in Wisconsin with a population greater than 500,000. Another third of the sample resided in the four Wisconsin cities (Madison, Green Bay, Racine and Kenosha) not located in the Milwaukee metropolitan area that have a population between 60,000 and 500,000. The final third resided in an arbitrarily selected group of 11 Wisconsin counties having no municipality with a

in many of their characteristics. These three makes were chosen nevertheless because they are manufactured by different manufacturers and because the models classified under each make are roughly comparable in price to models classified under the other makes. Furthermore, given the limitations I put on the period in which eligible respondents could register their car, it was necessary to include all models of Plymouth in the sample if enough respondents were to be found for that stratum. Consequently, to maintain comparability it was necessary to include all models of Ford and Chevrolet also. For many purposes it would have been desirable to include in the sample owners of automobiles manufactured by American Motors Corporation. The limited size of the sample, however, meant that inclusion of such owners would have disproportionately increased the sampling error.

Before a sample was drawn from the registration lists, I deleted the names of all owners who had business names. Such owners were identified on an ad hoc basis, usually because the owner's name ended with "Co." or "Inc." The purpose of this exclusion was to restrict the sample as far as possible to persons purchasing automobiles for personal use. I felt that the differences between purchasers for personal and business use were likely to be great. Furthermore, given the limited size of the sample, it was not advisable to measure both those differences and the many other hypothesized differences—such as differences between purchasers of different makes and purchasers residing in different locales—that I desired to measure. Limited resources prevented use of a more accurate method of excluding purchasers for business uses, and accordingly it must be assumed a limited number of such purchasers were included in the sample.

The person actually interviewed was not necessarily the person listed as the registered owner by the Wisconsin Department of Motor Vehicles. The interviewers were instructed to determine which person had handled "most of the business details" in selecting and buying the car. That person, who usually was also the registered owner, became the final respondent. This procedure was adopted because I felt that the person who handled most of the business details would be the person to whom most of the dealer's attempts to give notice about the express warranty would be directed and who would therefore, in all likelihood, have received the greatest amount of notice about the warranty.

Most of the interviews were conducted in the last two weeks of April 1967 and the first week of May 1967. Since in most instances the date of delivery of the automobile to the purchaser and the date of registration with the Wisconsin Department of Motor Vehicles differed by less than one week, most respondents had possessed their automobiles from three to five months at the time they were interviewed. In a few instances, however, the automobile was delivered as much as several months before it was registered, and in those cases the respondents possessed their vehicles for a much longer period.

population greater than 15,000.¹³ I stratified the sample according to make of car and locale so that I could test more precisely any differences between purchasers differing in respect to these variables. Because the sample was stratified so that actually nine separate samples were drawn (Milwaukee Chevrolet, Milwaukee Plymouth, Medium Sized City Ford, Rural Chevrolet, etc.), thereby leaving out many parts of Wisconsin's car buying population completely, it is not statistically exact to generalize from the results of my survey to all Wisconsin automobile purchasers, or even to all purchasers of the makes sampled. Nevertheless, I will often present data for the entire sample as if it were representative of the population, since the various subsamples seem sufficiently representative of Wisconsin's total new car buying population to make the data for the entire sample interesting and in some instances probably descriptive of the state's population.¹⁴ For the same reason I will from time to time report data for all purchasers of a particular make or residing in a particular locale.

I shall begin this article with a description of the substantive content of the new car warranty and the types of disputes that can arise when a new car owner requests a free repair under the warranty. I will also describe the procedures that are used to resolve these disputes. I shall then analyze the factors, legal and nonlegal, that appear to have the greatest impact on an owner's ability to obtain a favorable resolution of a warranty dispute. These dispute settling practices will then be evaluated in terms of various norms that have been suggested for measuring the justness of a resolution of a contract dispute involving a consumer. Finally, I will discuss the advantages and disadvantages, with par-

¹³ The counties that were selected were rural counties (as defined in the text) in which the University of Wisconsin Survey Research Laboratory had interviewers located and in which, therefore, it would not be unduly expensive to interview respondents. These counties were Columbia, Dodge, Grant, Calumet, Oconto, Polk, Price, Sauk, Trempealeau, Washington, and Waupaca.

Because these rural counties were not selected randomly, it is not provable statistically that the samples drawn from them is representative of new car purchasers from all rural areas in Wisconsin. Nevertheless, the counties selected are scattered geographically throughout the state and hence it seems reasonable to assume the sample drawn from them is generally representative of rural purchasers of each make.

¹⁴ It would, of course, be even more inaccurate to consider the sample as representative of car purchasers in the country as a whole, since Wisconsin automobile purchasers differ in many respects from purchasers elsewhere. For example, Plymouths are purchased by a smaller percentage of Wisconsin automobile owners than by automobile owners generally. Whereas in 1966 Plymouth ranked fourth nationally in new car sales by domestic manufacturers, in Wisconsin Plymouth only ranked eighth. 1967 AUTOMOTIVE NEWS ALMANAC 25, 37. This difference is largely accounted for by the disproportionate share of the Wisconsin new car market captured by American Motors Corporation, which has located its only assembly plant in the state. *Id.*

ticular emphasis on problems of effectiveness, of various legal approaches that might be taken to alter dispute settling practices in the directions considered desirable by these various norms.

II. THE CONTENT OF THE WARRANTY

Because the new car purchasers interviewed in connection with this project all purchased new 1967 model year vehicles manufactured by the three major domestic manufacturers, I shall restrict my analysis to the rights of original owners under the warranties issued by those manufacturers in 1967.¹⁵

In their essential features the 1967 model year warranties of the three major manufacturers are identical.¹⁶ The basic warranty

¹⁵ There were a few warranty changes made at the time 1968 model year automobiles were introduced, but these changes concerned mostly the rights of second and subsequent owners and do not substantially affect the applicability of my analysis to the rights of original owners today.

The changes in the rights of second and subsequent owners introduced by the 1968 warranties are very complex and need not be described in detail. Although there is considerable variation between manufacturers, the basic principles introduced were three: (1) some manufacturers extend warranty protection only to the first or the first and second owners; (2) some manufacturers charge a fee for transferring warranty protection from first to subsequent owners; (3) in some instances a second or subsequent owner will have to pay the first 25 dollars on the claim arising from each visit to a dealer for warranty repairs. For a detailed description of these changes, see *AUTOMOTIVE NEWS*, Oct. 2, 1967, at 4, col. 1. For some other minor changes in the 1968 warranty that can affect the rights of first owners, see notes 20-22, 58 *infra*.

As this article was being sent to the printer, the automobile manufacturers announced further changes in the warranty for the 1969 model year. The manufacturers have reduced the basic warranty protection to 12 months or 12,000 miles, whichever comes first, and restricted the 5 year/50,000 mile warranty to the power train. General Motors and Ford have also changed their policies on the requirements of maintenance and certification for their 5 year/50,000 mile warranty. The 1969 Ford warranty does not require a dealer's certification of the maintenance performed and the 1969 General Motors warranty does not mention any service requirements. *AUTOMOTIVE NEWS*, Sept. 30, 1968, at 2, cols. 1-2, at 67, col. 3. All three manufacturers have some new provisions for second owners. For details see *Id.*, at 2, cols. 1-2. These changes will affect some of the warranty administration processes described in this article, but they are not likely to affect substantially any of my conclusions about the needed improvements in warranty administration or about the likely efficacy of the different ways of regulating warranty administration.

¹⁶ In this article I will discuss only the warranty ordinarily issued with the sale of a passenger automobile. Other types of vehicles often carry a different warranty. For example, cars with high performance engines, such as the Ford 427 or 428 CID Interceptor Engines which are typically used for racing, usually carry a much shorter warranty on the order of three months. Many trucks also carry a different warranty. It is usually longer than the automobile warranty but provides that as the mileage increases the owner is to absorb an increasing percentage of the cost of repair. If an automobile purchaser buys a very large number of automobiles annually, he may negotiate a separate warranty contract with the manufacturers to replace the ordinary warranty, but this practice is rare.

covers defects in materials and workmanship for a period of 24 months from the date of delivery to the original purchaser or for 24,000 miles, whichever comes first.¹⁷ In addition, most of the major parts, including the power train, suspension system and steering gear,¹⁸ are covered by a special warranty against defects in material or workmanship for the first five years after delivery or 50,000 miles, whichever comes first. The warranty is intended to cover only those defects that are attributable to some fault in the condition in which the automobile was delivered to the owner. Accordingly the manufacturers exclude defects caused by abnormal use of the vehicle, by alterations made outside of an authorized dealership, and by use of parts not approved by the manufacturer.¹⁹ For similar reasons the manufacturers exclude warranty coverage for normal maintenance services (such as an engine tune-up), normal replacement of service items (such as spark plugs), and normal deterioration of soft trim and appearance items (such as upholstery and paint).

The five year warranty, and in the case of Ford and Chrysler the basic two year warranties as well,²⁰ are subject to the further condition that the owner follow the manufacturer's required maintenance schedules. These schedules contain only the minimum necessary maintenance and do not include all the maintenance operations that the manufacturers consider desirable. They prescribe periodic replacement of engine oil, cleaning and replacement of filters, lubrication and certain other service operations.²¹ These service operations may be performed by anyone, but once every six or twelve months, the period varying according to the manu-

¹⁷ Tires are excepted from this basic warranty coverage. They are warranted separately by the tire manufacturer. The terms are the same as those offered any purchaser of a new tire.

¹⁸ Chrysler lists the following parts as covered by the five year warranty: engine block, head and all internal transmission parts, torque converter, drive shaft, universal joints, rear axle and differential, suspension system (excluding shock absorbers), steering gear and linkage system, wheels and wheel bearings. The other manufacturers provide similarly.

¹⁹ This latter restriction would apparently apply even though the non-approved parts were used by an authorized dealer in the course of making a warranty repair.

Ford's formal warranty does not specifically state these limitations. Ford applies them in practice, nevertheless, arguing that they are implied because the basic warranty promises only that the vehicle will be "free under normal use and service from defects . . ." (emphasis added).

²⁰ Ford changed this provision in its 1968 warranties and now the maintenance and certification provisions apply just to the five year portion of the warranty.

²¹ In the 1967 model year, Ford stated in the warranty explanation in its owner's manual distributed at the time of delivery, but not in the formal warranty itself, that certain named brands of engine oils and filters, "or their equivalent," must be used in required maintenance operations. Ford distributed the named brands, which are manufactured for it according to its specifications. This requirement was dropped in the 1968 model year.

facturer,²² the owner must present evidence (usually in the form of receipts) to an authorized dealer that the required maintenance has been performed and obtain the dealer's certification to that effect.

If an owner wishes to secure a free repair under the warranty, Chrysler directs him to return the vehicle to any dealer authorized to sell new automobiles manufactured by Chrysler, where the defect will be repaired, without charge for parts or labor, if the dealer decides the various conditions to the warranty have been satisfied. General Motors directs the owner to return the car to any dealer authorized to sell new vehicles of the same make. Ford directs the owner to return the vehicle to the selling dealer unless the owner is traveling or has become a resident of another locality, in which case the car can be returned to any authorized Ford dealer.²³ All the manufacturers provide explicitly that the only remedy available under the warranty is repair or replacement of defective parts. They also disclaim all implied warranties or other liability relating to quality. The owner is therefore denied any remedy for consequential damages as well as such ordinary remedies for breach of a warranty as monetary compensation for the diminution in the vehicle's value caused by the defects or, if the defect is serious enough, rescission of the sales contract and return of the purchase price.²⁴

III. METHODS OF DISPUTE SETTLEMENT

In this section I will describe the procedures employed by the three principal participants in the administration of the automobile warranty—the manufacturer, the dealer, and the owner—to determine whether a particular repair should be made under the warranty, and some of the problems that arise in making that decision. I shall begin with a description of those procedures that apply generally to requests for all types of repairs and then proceed to a discussion of special problems and procedures for particular types of warranty repair claims.

A. Generally

The key decisionmaker in the warranty administration process is the dealer. When a new car owner brings his vehicle to an authorized dealer because he thinks it is malfunctioning and asks for

²² In 1967, General Motors and Chrysler required certification once every six months and Ford only once every twelve months. In 1968 Chrysler changed its warranty to require only annual certification. *AUTOMOTIVE NEWS*, Sept. 11, 1967, at 3, cols. 3-4.

²³ As a matter of policy, however, Ford will reimburse a dealer for all warranty work actually performed for an owner to whom he did not sell a car, even though under the warranty the owner was not entitled to demand performance of the warranty work from that dealer.

²⁴ See note 5 *supra* and authorities cited therein.

a free warranty repair, it is the responsibility of that dealer—imposed by the franchise contract with the manufacturer and usually performed by the service manager²⁵—to diagnose the cause of the malfunction and determine if the owner is entitled to a free repair. Sometimes the dealer will conclude that nothing is wrong with the automobile. If he decides there is a malfunction, the dealer must determine whether the conditions upon which warranty repairs are contingent were satisfied. In the usual case the manufacturer makes no direct effort to participate in the making of these determinations. The owner often tries to influence the dealer's determinations by persuasion and argument, frequently successfully, but the final responsibility for decision rests with the dealer.

Although the manufacturers ordinarily make no effort to participate in the initial determination about warranty coverage, they are of course very interested in the outcome. A manufacturer's most immediate interest, derived from its obligation to reimburse its dealers for most warranty repairs, is in having its dealers refuse to make them when the owner is not entitled to one. The manufacturers are also interested in having warranty repairs made when the owner is entitled to one. They are keenly aware that a satisfied new car purchaser will not only become a proponent of his make among his friends but will also be more likely to purchase the same make for his next new car.²⁶

Because of this interest in dealer warranty determinations, the manufacturers have established various controls over these decisions. Most of the controls are designed to prevent dealers from claiming reimbursement for warranty repairs that should not have been made. To obtain reimbursement, a dealer must file a claim form which includes, *inter alia*, the age and mileage of the vehicle and a brief description of the warranty repairs performed. These forms are sent to a designated representative of the manufacturer who performs a routine check to insure that there is no reason on

²⁵ Throughout this article I will frequently refer to the dealer when in fact I mean some employee of his who is authorized to make warranty decisions. In most dealerships the service manager makes the warranty decisions. In large dealerships, however, the service manager is desk oriented and participates only in the more difficult decisions. These are referred to him by the subordinate service employees who are authorized to make most of the decisions that can arise under the warranty.

²⁶ For a discussion of this view of the value of warranties, which is shared by many dealers, see *AUTOMOTIVE NEWS*, June 20, 1966, at 35, col. 3.

Another sales value the manufacturers attribute to the warranty is the continuing contact it encourages between the dealer and purchaser, since the purchaser must return to an authorized dealer, and usually the selling dealer, to obtain a warranty repair. The manufacturers hope that this continuing contact will contribute to a feeling of loyalty by the purchaser to the dealer which will assist the latter in making a subsequent sale to the customer. A wrongful denial of a warranty repair will likely have an adverse affect on any sense of loyalty held by a customer.

the face of the form to dishonor it. In recent years the manufacturers have begun to check the validity of the age and mileage representations on the dealer's claim form against their own computerized records for each new car sold.²⁷ Computers are also used to determine whether the purchaser has been complying with the maintenance and certification requirements and to insure that the dealer is not claiming reimbursement for a repair for which he had earlier been paid.²⁸ All dealers are also required to save any part replaced under warranty for a stipulated period of time, generally not exceeding 30 days, and to save for one year all written records that are not forwarded to the manufacturer that relate to the warranty repair. A regional service representative of the manufacturer²⁹ visits each dealer periodically. He makes spot checks of the parts and the dealer's records to determine whether the dealer's reimbursement claims relate to repairs actually made and to check if the cause of the malfunctions were faults in the condition in which the vehicles were delivered to the owners (usually called manufacturing defects). The thoroughness and frequency of these checks depend in part on statistics the manufacturer prepares for each dealer showing the number and type of warranty claims submitted per new car sold. If the statistics indicate that a dealer is submitting an abnormal total number of claims, or an abnormal number of claims for a particular type of repair, the regional service representative will be likely to make more thorough and frequent checks.³⁰ If as a result of these checks

²⁷ For a description of one manufacturer's computer operation, see *AUTOMOTIVE NEWS*, Nov. 22, 1965, at 48, col. 2.

²⁸ Frequently, a dealer will be asked to make a second warranty repair with regard to a particular malfunction because the first repair was inadequate. Although the dealer is expected to make a second warranty repair in such circumstances, the manufacturers will not reimburse the dealer for these "shop comebacks." They fear that any other reimbursement policy would only encourage dealer carelessness. See text and accompanying note 74 *supra*.

²⁹ The manufacturers' administration of warranty claims, as well as other manufacturer-dealer relations, is quite decentralized. Each of the manufacturers has divided the country into regions and has delegated most decisions to the regional offices. Each regional office will have an official, known as a service representative, solely responsible for service and warranty problems. He is principally responsible for resolving reimbursement problems with the dealer. A dealer will also ordinarily turn to him whenever a warranty problem arises that requires consultation with the manufacturer. Only in rare instances, and then ordinarily on a referral by the regional service representative, will the Detroit offices become substantively involved in the settlement of a warranty claim by an owner or a reimbursement claim by a dealer. Some of the manufacturers further divide the regions but the officials in subregional offices will usually concentrate on new car sales. Because of his greater accessibility, a subregional official may occasionally be consulted on a warranty matter, but ordinarily the manufacturers vest all power to commit them to reimburse a dealer for a warranty repair in the regional service representatives.

³⁰ In extreme cases when the manufacturer has lost absolutely all con-

fraud or consistently poor diagnosis is suspected, the manufacturers will often direct the dealer to return all or certain parts replaced in the course of warranty repairs to a designated place where the manufacturer can inspect them before honoring the reimbursement claims. Even if there is no pattern of abnormal claims from a dealer, from time to time the manufacturer may require the return of a specific replaced part for inspection if it questions the validity of a particular reimbursement claim.³¹

If a manufacturer concludes that a dealer has submitted a reimbursement claim for a warranty repair that has not been made or for which the manufacturer is not responsible under either the warranty or its franchise contract with the dealer, the manufacturer is entitled to disallow the claim thereby, requiring the dealer to absorb the cost.³² As a practical matter, however, the manufacturers are reluctant to disallow claims when the issue is whether the owner was entitled to a warranty repair and it appears that the dealer's error was made in good faith. Moreover, controls over a dealer's warranty determinations that depend on checks of the reimbursement claims cannot discover all cases of dealer error or fraud, and they have especially limited effectiveness when the warranty repair requires only the expenditure of labor.³³ For these reasons, the manufacturers have established a further control requiring all dealers to obtain prior approval from a regional serv-

fidence in the dealer, it will actually station a representative in the dealer's service shop to oversee personally all warranty decisions.

³¹ There are a number of reasons in addition to control over dealer decisionmaking that cause the manufacturers to require return of replaced parts. If the part is an expensive one which can usually be reconditioned and resold, or in some other way salvaged, the manufacturers are likely to require that all such parts be returned together with reimbursement claims. The manufacturers pay for the replacement parts and accordingly believe they are entitled to whatever value remains in the replaced part. Another reason for requiring some dealers to return defective parts is to aid the manufacturer's quality control program. By analyzing the causes of many defects in a particular part, the manufacturer may be able to devise a new assembly line procedure that will insure fewer defects in the future.

³² When a manufacturer rejects a dealer's claim for reimbursement it will return the claim form to the dealer with the reason for rejection indicated on the form. In many instances the reason for rejection relates only the manner in which the form was completed. For example, the repair may not have been described in enough detail. In these instances the dealer will redraft the claim and resubmit it to the manufacturer.

³³ The manufacturers fear that many of the reimbursement claims for "labor only" repairs relate to a repair that never was made. My interviews with dealers confirmed their fear. See note 72 *infra*. Of course, to be successful at such a practice, the dealer must be careful not to submit too many fictitious claims and that the fictitious claims do not all indicate the same type of labor only repair. Otherwise, the manufacturer's statistics—showing the number and types of warranty claims submitted by each dealer—will indicate something is amiss at the dealership and an investigation may be made.

ice manager before making certain warranty repairs that are especially expensive or that often raise troublesome issues about the manufacturers' obligations.³⁴ A limited number of dealers are required to secure prior approval of additional, or even all, repairs if, on the basis of past experience, the manufacturer doubts the dealer's judgment or good faith. If the malfunction has rendered the owner's car inoperable or unsafe to operate, or if the manufacturer has faith in the dealer's judgment, a dealer can often obtain prior approval simply by telephoning the manufacturer's regional service manager and describing the reasons the dealer thinks a particular repair should be made under the warranty. In other situations the dealer is directed to do nothing to the vehicle until a service representative has an opportunity to visit the dealership and examine the car.³⁵

The manufacturers' policies in fixing the rate at which dealers are paid for warranty repairs, although perhaps not established with that end in mind, also tend to discourage them from making repairs under the warranty for which the owner should be charged. In establishing current reimbursement rates, the manufacturers try to compensate the dealer for all his costs in making the warranty repair while at the same time ensuring that no profit is made on the work.³⁶ This policy is implemented by paying the dealer for new parts used in warranty repairs at the cost³⁷ to the dealer plus approximately 25 percent of the cost for overhead expenses. Reimbursement for labor is based on "flat rates." The manufacturer has calculated the amount of time a skilled mechanic should devote to each labor operation and added a small amount to allow for diagnosis of the difficulty and for minor diversions that

³⁴ If such a repair is made under warranty without obtaining prior approval, the manufacturer will ordinarily reject the claim for reimbursement. In its warranty policy manual issued to dealers, Ford states, as an exception to the general rule, that it will honor a reimbursement claim for a repair for which prior approval was required but not obtained if the malfunction rendered the vehicle inoperative and if obtaining prior approval would have caused undue inconvenience to the owner.

³⁵ This examination will usually be made in connection with a regular visit by the regional service manager to the dealership to check on warranty matters. Consequently, there is often a delay of several weeks in obtaining prior approval to make a warranty repair.

³⁶ Although definite statements to this effect were made to me in the course of my interviews with representatives of the manufacturers, in commenting on an earlier draft of this article a representative of Ford—not the one I had originally interviewed—stated that it would be more accurate to report that the manufacturer's reimbursement policy was to compensate the dealer "for all his costs plus a reasonable return in making the warranty repair without necessarily making it as profitable as customer-paid work."

³⁷ In this context, cost to the dealer means the cost at which the dealer could have obtained the part from the manufacturer. If the dealer obtains the part from a wholesaler or in some other fashion, the dealer is required to absorb any markup except in special circumstances.

may occupy the mechanics. The manufacturer will ordinarily reimburse the dealer only for the time these flat rates indicate should have been devoted to the repair, regardless of the time actually devoted to the repair. This time is paid for at an hourly rate negotiated between the manufacturer and each individual dealer. This rate is based on the wage rate for mechanically skilled employees prevailing in the dealer's area, plus a mark up between 75 and 125 percent for overhead costs, including the extensive record keeping costs associated with warranty repairs.³⁸ As a result of these reimbursement rates, a dealer usually receives less for warranty work than he would charge a paying service customer for the same work. Indeed, many dealers believe that the flat rates for some labor operations are so stringent that they inevitably absorb a loss on such warranty work, and some dealers believe their hourly labor rate is so low that they absorb a loss on almost all warranty work.³⁹ The present rates for dealer reimbursement, therefore, encourage dealers to charge owners whenever possible. And if a dealer does decide to perform a warranty repair, he is discouraged from making additional warranty repairs that are necessary or desirable but have not been requested by the owner.⁴⁰

No discussion of the controls employed by the manufacturers would be complete without consideration of the general nature of dealer-manufacturer relations. The powers granted the manufacturer in its dealer franchise contract are so extensive that a dealer inevitably suffers if he falls into disfavor. This will happen, of course, if the manufacturer believes the dealer is claiming reimbursement for too many warranty repairs. For example, a manu-

³⁸ Ford recently introduced a policy of tying the warranty labor rate to wage data for the applicable geographical area provided by the United States Bureau of Labor Statistics. This has often resulted in an increase in the warranty labor rate.

³⁹ The rate of reimbursement for warranty work has been a source of regular controversy between the manufacturers and dealers. Dealers have also complained about the slowness with which the manufacturers process claims for reimbursement. See, e.g., *Wall Street Journal*, April 25, 1967, at 1, col. 6; *AUTOMOTIVE NEWS*, Feb. 8, 1965, at 1, col. 5; NATIONAL AUTOMOBILE DEALERS ASSOCIATION, REPORT OF INDUSTRY RELATIONS COMMITTEE TO THE BOARD OF DIRECTORS (1965).

⁴⁰ The practice of "discovering" additional repairs that have not been requested by the owner is quite common in the auto repair business, as almost any car owner can testify. The practice is encouraged by dealers by giving incentive bonuses to their service managers based on the dollar amount of service business. The manufacturers all discourage incentive bonuses for warranty work. It has been suggested this policy leads to poorer performance on warranty work than on commercial work. *AUTOMOTIVE NEWS*, March 15, 1965, at 44, col. 5.

Many dealers attempt to make up for the lack of profit on warranty work by "discovering" nonwarranty repairs that need to be made whenever an owner returns his car to the service shop for warranty repairs. One service manager told me it would be a rare occurrence for a car to be in his service shop and have only warranty work to be done on it. See also *AUTOMOTIVE NEWS*, June 20, 1966, at 35, col. 3.

facturer may be slow to fill orders for the very popular models.⁴¹ An unpopular dealer may also be required to obtain prior approval for all or many warranty repairs and he will be subjected to extensive checks of replaced parts and warranty records. This hurts the dealer by increasing his administrative expenses and reducing his speed in performing warranty repairs for valued customers. Moreover, as will be discussed in more detail later,⁴² there are occasions when nearly all dealers request the manufacturer to pay for a repair to which the owner is clearly not entitled under the warranty but which the dealer nevertheless would like to make free of charge in order to preserve the good will of a valued customer. The manufacturers are often sympathetic to such requests, but naturally they are more inclined to grant a request made by a dealer in whom they have confidence than by one in whom they have little or none.

A dealer can also gain the manufacturer's disfavor by charging customers for repairs that should have been made under the warranty. Consequently, the relationship between dealer and manufacturer tends also to discourage the intentional nonperformance of a dealer's warranty obligations.⁴³ The manufacturers have developed few devices for detecting and correcting specific instances of dealer nonperformance of warranty obligations, however. They rely almost solely on their responses to owner complaints about poor warranty service to exercise control over such dealer activity.

When an owner is wrongfully denied a warranty repair, there are several courses of action open to him to obtain redress. Usually he will make some effort to argue with several officials within the dealership in the hope that the original determination will be overturned.⁴⁴ If that effort fails, he can externalize his complaint by

⁴¹ For example, see the comment of one dealer trade association manager reprinted in S. MACAULAY, *LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS* 167-68 (1966). Many of the more overt coercive practices by manufacturers against dealers have, of course, been outlawed by the federal "Dealer's Day in Court Act", 15 U.S.C. §§ 1221-25 (1964).

⁴² See pp. 1037-38 *infra*.

⁴³ The manufacturers do reserve the right to reimburse an owner who was required to pay for repairs that should have been made under the warranty and then to charge the dealer who received payment from the owner the difference between the amount received and the amount the manufacturer would have paid the dealer for making the repairs under the warranty. This action can only be employed, however, if the manufacturer learns of the owner's unjustified treatment, and even then it leaves the dealer in no worse position that he would have been if he made the repairs under warranty in the first place.

⁴⁴ In my survey 75% of the respondents who experienced difficulty in obtaining a warranty repair attempted to overcome the difficulty, often successfully, with responses restricted to the dealership level.

Another remedy occasionally employed by an owner denied a warranty repair to which he believes himself entitled is to instruct the dealer to bill him for the repair and then to refuse to pay the bill. Two respondents in my survey reported they took this course of action.

initiating a lawsuit, by contacting a lawyer or a public or private consumer protection agency—such as a Better Business Bureau or a state agency charged with investigating consumer fraud—or by complaining to the manufacturer.

Very few new car owners resort to the extreme remedy of initiating a lawsuit against the dealer or the manufacturer. Thus, in my survey of 286 new car purchasers in Wisconsin, not one had initiated a lawsuit over the denial of a warranty repair on his new car or on the car he had owned previously. The manufacturers concede that each year a small number of lawsuits are filed against them based on a failure to make a repair under warranty. The exact number of such suits is confidential but the number is much less than the number of suits seeking consequential damages to property or person allegedly caused by a manufacturing defect.

There appears to be a slightly greater willingness by owners to consult a lawyer or a public or private consumer protection agency. Five owners in my survey took such action. The Better Business Bureau of Milwaukee estimates that in 1965 they received 40 complaints about dealers failing to honor their obligations under the warranty.⁴⁵ In Wisconsin, consumers with complaints can contact various state agencies, principally the Motor Vehicle Department, which has the power to revoke the license to do business of any dealer or manufacturer who fails to honor his "written obligations."⁴⁶ However, a department official indicated that they receive only a few complaints about dealer failure to honor the new car warranty.⁴⁷ When a lawyer or a consumer protection agency is consulted, the usual response is to contact the dealer and, if that fails to resolve the dispute satisfactorily, a representative of the manufacturer. The lawyer or agency will almost never conduct an independent examination of the vehicle; instead, it will listen to the stories of the parties involved and try to mediate a mutually satisfactory resolution. When a manufacturer is contacted by a lawyer or agency, it processes the matter in the same way it would a letter of complaint from an owner, a process that is described below. The only formal difference in a manufacturer's procedures is that if a lawsuit appears to be a substantial possibility, a house

⁴⁵ Interview with a representative of the Better Business Bureau of Greater Milwaukee.

⁴⁶ WIS. STAT. § 218.01(3)(a) (1965). Many other states have similar licensing statutes. Although licenses to do business have rarely been revoked under these licensing statutes, the statutes have had the effect of encouraging the establishment of an informal dispute settling system under the supervision of the state agency which administers the licenses. These informal systems have been more concerned with dealer-manufacturer disputes than with disputes involving owners, however. See S. MACAULAY, *supra* note 41, at 29-43, 135-63.

⁴⁷ Many more complaints are received alleging that a used car dealer misrepresented the quality of a used car. Interview with representative of the Wisconsin Motor Vehicle Dep't, Madison, Wisconsin.

counsel may be consulted who may view the issues presented somewhat differently from the officials who ordinarily deal with owner complaints. It is also possible that the officials ordinarily responsible for warranty complaints will be more concerned to negotiate a solution satisfactory to the owner if a complaint comes from a lawyer or consumer protection agency than they would be if the complaint had come from the owner himself.⁴⁸

The most frequent recourse of an owner denied a warranty repair to which he believes himself entitled is to write a letter of complaint to the manufacturer. The manufacturers receive literally thousands of complaints dealing with warranty matters monthly. The respondents to my survey had written 14 times. My interviews with dealers suggest that a dealer selling about 2,000 cars per year can expect his customers to send the manufacturer between two and four letters each month complaining about warranty service. Because of this volume, the manufacturers have developed a bureaucratized procedure for handling complaints. The manufacturer will ordinarily reply to the complainant that performance of warranty work is the dealer's responsibility and that the dealer is an independent businessman for whom the manufacturer has no direct responsibility. Nevertheless, the customer is assured the dealer will contact him again about the matter. The owner's letter and a copy of the manufacturer's reply are sent to the dealer. The dealer is directed to contact the owner about the matter within a specified period of time. The dealer is then required to report the results of the contact to the manufacturer's regional service representative. The manufacturer will not consider the matter closed until either the owner is satisfied or the regional service representative is convinced that the dealer has done everything he should to meet the owner's demands. Before arriving at this conclusion, frequently the regional service representative will himself examine the owner's car in order to form an independent judgment about the merits of the owner's claim. Ordinarily the manufacturer's head office will not become involved in the substantive aspects of the dispute, but if the regional service representative thinks the matter should be referred there, or if the owner is particularly aggressive and continues writing letters of complaint, the final decision on what remedies to extend under the warranty

⁴⁸ Some incidents recounted by respondents to my survey suggest this may be the case, although they are too few to allow any statistically significant conclusions to be drawn. For example, one respondent told of an occasion on which he had transmission difficulties and the dealer originally claimed the cause was misuse. The respondent contacted a lawyer, who in turn contacted the manufacturer. After inspection of the vehicle by a representative of the manufacturer, the transmission was repaired under the warranty. The respondent was also paid a mileage allowance for the time the car was actually being repaired. The manufacturers rarely reimburse an owner for this type of expense. See note 82 *infra* and accompanying text.

may actually be made in Detroit.

Letters of complaint to the manufacturer are not frequently written, but they represent a fairly effective remedy. The manufacturer's procedures insure that unless the dealer meets the owner's demands or convinces him that he is not entitled to a warranty repair, some representative of the manufacturer will make an independent evaluation of the merits of the owner's claim.

This independent evaluation, of course, serves as an important check against arbitrary action. Letters of complaint also provide the manufacturers with their only substantial means of determining the extent to which dealers are improperly denying warranty repairs. The manufacturers prepare statistics indicating which dealers and what type of repairs or warranty disputes are the sources of the complaints. These statistics may indicate to the manufacturer that remedial action is needed with respect to a particular dealer or that warranty administration procedures should be changed.

B. Specific Problems

The emphasis in this section will be on the procedures and problems affecting the dealer's initial determination about warranty coverage and not on the manner in which the owner can challenge that decision, since the owner's remedies, as just described, are essentially the same in all instances. There is no accepted classification for special issues and problems in warranty administration. The classification used here, therefore, is based on my own impressions about what constitutes useful divisions. On that basis I have devised the following classifications: existence of a manufacturing defect; maintenance and certification provisions; dealer unwilling or unable to repair; visiting owners; over warranty coverage; and remedies other than repair or replacement.

1. EXISTENCE OF A MANUFACTURING DEFECT

One of the most important decisions to be made about any warranty claim is necessitated by the provision in the warranty that free repair is available only for defects in material or workmanship. Each time a warranty repair is requested, it must be determined whether the malfunction resulted from such a condition, or from abnormal use of the automobile (including previous improper repair⁴⁹) or normal deterioration that is expected from use of the ve-

⁴⁹ If the reason for a previous improper repair is faulty workmanship by an authorized dealer, then a second repair will be made under the warranty, of course, although the manufacturer may not reimburse the dealer for this repair. If a second repair is required because parts not approved by the manufacturer were used either by an authorized dealer or somebody else, or because of faulty workmanship by other than an authorized dealer, the warranty technically bars a second free repair. See note 19

hicle (including normal maintenance services and normal replacement of service items⁵⁰). This determination involves essentially two judgments. The first requires definition of those uses that should not cause a malfunction. This judgment is theoretically made by the manufacturer when the automobile is designed. Thus, an automobile is designed to withstand the stresses occasioned by a sudden stop in city traffic, and a malfunction caused in that manner would be considered a manufacturing defect, but most automobiles are not designed to withstand the stresses of high speed automobile racing, and a malfunction caused by such activity would be attributed to abnormal use or abuse. Similarly, the manufacturers do not ordinarily design brake linings or spark plugs to last the lifetime of an ordinary automobile, and consequently a malfunction in them after a limited period of operation is attributed to normal deterioration. The second judgment involves the application of these predetermined standards to the particular malfunction.

In most cases the manufacturers and dealers do not perceive serious problems in making these judgments. They assert that there is an implicit understanding between them about what uses should not cause damage. In a few instances, however, a manufacturer will issue specific instructions about appropriate use—thus, one manufacturer specially instructs its dealers that using a passenger car to tow trailers without specially equipping the vehicle with a “trailer towing package” will be considered misuse and that damage caused thereby is not covered by the warranty.⁵¹ Similarly, the manufacturers and dealers believe that on the basis of a visual inspection of a damaged part, a technically trained person, such as a dealer’s service manager, can determine in most cases whether the damage was caused by abnormal use or normal deterioration. There are, of course, cases in which one or both judgments cannot be easily made. The determination of whether to allow a warranty repair in difficult cases is ordinarily left to the dealer, principally because more extensive efforts to decide the true cause of the damage would be too expensive. For example, in some cases a more accurate determination of the cause of damage to a part could be made if the part were subjected to metallurgical tests, but the tests themselves would usually cost more than a new part.

supra and accompanying text. This problem rarely arises, however, since most owners return to an authorized dealer for repairs during the warranty period and nearly all dealers use manufacturer approved parts exclusively.

⁵⁰ Normal maintenance services and normal replacement of service items include such matters as lubrication and replacement of spark plugs.

⁵¹ CHRYSLER MOTOR CORP., WARRANTY & POLICY PROCEDURE MANUAL: PASSENGER CARS 48 (3rd ed. 1966). Of course, owners are informed of many of these definitions of normal use in the explanation on proper use of the vehicle contained in the owner’s manual distributed to them at the time of delivery.

The manufacturers have constructed a number of special procedures to give themselves a check in some instances on the dealer's judgment about the existence of a manufacturing defect. Prior approval is required for a number of repairs that the manufacturers believe are likely to be made necessary by abnormal use or normal deterioration. Repairs of body or appearance items, such as paint or upholstery, are especially likely to require prior approval for this reason.⁵² Because malfunctions in most of these parts do not render a car inoperable or unsafe, the manufacturer frequently insists that its representative personally inspect the vehicle before authorizing a warranty repair, thereby often necessitating a week or two delay before repairing the car. More importantly, since the defect is considered particularly likely to be caused by normal deterioration or abnormal use, the manufacturer's representative is likely to require specific proof of a manufacturing defect before authorizing a warranty repair. If defects occur in other parts, the opposite presumption is likely to be applied and a repair made under warranty unless definite proof of abnormal use can be established.⁵³ Malfunctions in some other parts are considered so likely to be due to abnormal use or normal deterioration that the manufacturers have established a rule that they are either not covered by the warranty or are covered only for a short time or mileage period. Normal maintenance operations, such as replacement of fluids, fall in this classification. So do parts which are especially affected by the manner in which the vehicle is operated, such as spark plugs, brake linings, and most parts in manual clutches. In rare cases, parts that are subject to these rules can malfunction because of some manufacturing defect; for this reason the manufacturer will occasionally authorize a repair under the warranty. The responsibility for identifying these special circumstances rests with the dealer, and the dealer must always obtain prior authorization if he expects to be reimbursed for the warranty repair. As with other exceptions to the rules of warranty administration, a dealer is more likely to request authorization for a warranty repair if the owner's good will is considered valuable.

Some of the most frequent disputes about the existence of a manufacturing defect concern repairs for which the manufacturer will not reimburse the dealer even if the repair is made under

⁵² If the repair is a particularly expensive one, prior approval is likely to be required. A principal reason for this requirement is to allow the manufacturer to determine whether there is a cheaper way to correct the malfunction. For example, frequently it is sufficient, and cheaper, simply to repair an expensive part rather than replacing it entirely.

⁵³ The presumption of a manufacturing defect is stronger the closer the malfunction occurs to the delivery date. Thus, the respondents to my survey, most of whom were interviewed within four or five months of their most recent purchase of a new car, reported very few instances in which a dealer claimed a malfunction was not covered by the warranty on that new car.

warranty. There are a number of items on a new car that may be affected by the transport of the car from the factory to the dealer. The dealer is expected to make any necessary adjustments to these items before delivery to the owner. For example, he is expected to align and balance the wheels, adjust the doors and windows, and eliminate unnecessary rattles. In theory the dealer is compensated for this pre-delivery inspection and conditioning by an amount in addition to the dealer's ordinary profit that the manufacturer includes in the suggested retail price.⁵⁴

If the owner later requests a warranty repair on a pre-delivery item and it is determined that the difficulty was caused by a fault in the condition of the car when delivered to the owner, the manufacturer, although expecting the dealer to make a free repair, will not reimburse the dealer for his efforts.⁵⁵ Otherwise dealers would be encouraged to skimp on pre-delivery work, relying instead on charging the manufacturer for any inadequacies that are discovered subsequently by the owner. Because the manufacturers have no obligation to pay for these dealer responsibility items, they take little interest in the administration of requests for such repairs, although should an owner complain to them about an improper denial of such repairs, they will handle the complaint in the usual manner. There is an understanding between the manufacturers and dealers, however, that dealer responsibility repairs need not be made under warranty for the entire warranty period. The reason for this restriction is that pre-delivery type repairs are often necessitated by normal deterioration and abnormal use. General Motors and Chrysler make no attempt to establish the precise terms of the restriction but leave it to each dealer to set his own policy. Ford states in the owner's manual distributed to new car purchasers at the time of delivery that pre-delivery type repairs will be repaired only for the first 6,000 miles of operation, but not all Ford dealers follow that policy. At the dealership level the re-

⁵⁴ Since this amount is paid to the dealer by the owner in the purchase price and not by the manufacturer as compensation for specific work operations, the dealer receives the same amount regardless of the time spent on pre-delivery operations. As a result most dealers regard the amount as part of their profit on the sale and any amount spent on pre-delivery operations as subtracting from that profit.

⁵⁵ Ford, in addition, will not reimburse its dealers for a number of repairs which cannot be attributed to faulty pre-delivery conditioning—for example, labor only repairs requiring less than one half hour. The reasons for these restrictions usually concern the needs of the bureaucratic system established to administer the automobile warranty. For example, it is most difficult for the manufacturers to check the accuracy of dealer claims for reimbursement for labor only repairs. The expense of checking on a labor only claim of a small amount, therefore, would often exceed the amount of the claim. Ford fears that if they did not prohibit reimbursement for such labor only repairs, dealers would be tempted to submit a number of fictitious claims, secure in the knowledge that Ford could not afford to investigate them. See note 72 *infra*.

striction tends to be administered differently according to the size of the dealership. Small volume dealers tend to extend warranty protection on pre-delivery items for a variable period depending on the value of the customer's good will. In large volume dealerships the persons making the decisions whether to offer a warranty repair cannot have the detailed knowledge of each customer that is necessary to administer such an individualized system, and consequently, such dealers tend to establish fixed time and mileage limitations. Even in large volume dealerships, of course, if a customer is known to the service department to be an especially good one, he may receive a warranty repair on a pre-delivery item even though the fixed time or mileage limitation has expired.

Although the determination of whether a manufacturing defect caused a particular malfunction obviously provides the manufacturers and dealers with several problems, they both believe that their most troubling problem in this area of warranty administration is informing an owner that a warranty repair will not be allowed because it has been determined that abnormal use or normal deterioration caused the malfunction. Many new car owners are not very willing to accept such a determination. Consequently, if an owner's good will is valued, a dealer will often make a warranty repair even though it is clear that there was no manufacturing defect.⁵⁶ Usually the dealer will secure the manufacturer's prior approval in order to be certain of reimbursement, but occasionally a dealer will finance such a repair himself, especially if it is not expensive. In other situations, again in order to preserve good will, the owner is offered a repair at a reduced cost; for example, the owner might be asked to pay only for the labor in replacing the damaged part. In either case, in order to maximize the good will generated by such action, the dealer, with the manufacturer's encouragement, will usually convey the impression to the owner that the dealer is absorbing the additional cost of the repair, although in fact the dealer will ordinarily have obtained the manufacturer's prior assurance of reimbursement.⁵⁷

⁵⁶ If a warranty repair is made in these circumstances, it is frequently on the understanding with the owner that a further warranty repair will not be made if the difficulty occurs a second time. This disposition seems to be particularly common where an owner's teen-age son damages the transmission by drag racing and other activities common among teen-agers. A representative of one manufacturer expressed the opinion to me that this practice may do more harm than good to a dealer's and the manufacturer's good will. He was worried that dealers do not make clear to owners that the car is being repaired under warranty only as a favor and that a second warranty repair will not be made in such circumstances. Consequently, owners come to believe that they received the free repair because they were entitled to it, and when a second repair is needed they believe even more strongly that it should be made under warranty.

⁵⁷ All kinds of arrangements are possible in these cases and decisions seem to be made on an ad hoc basis. Thus, sometimes the manufacturer will pay for the parts, the dealer for the labor, and the owner nothing. In

2. MAINTENANCE AND CERTIFICATION PROVISIONS

In one sense the provisions in the warranty that condition the continuing validity of the warranty on following the manufacturer's maintenance schedules and certification requirements are also designed to protect the manufacturer from paying for warranty repairs that are not caused by a manufacturing defect. The manufacturers require regular maintenance services because the failure to obtain them can adversely affect the operation of the automobile and perhaps cause a malfunction. Similarly an important purpose of the certification requirement is to assure that the maintenance services have been performed at the required intervals. The manufacturers perceive a real problem with fraud by an owner presenting a receipt evidencing servicing by nondealer personnel. The certification requirement insures that maintenance is performed at least as often as certification is required and offers some check against the possibility that an owner, at the time he needs a warranty repair, will simply forge enough receipts for maintenance services to indicate that he has complied with the maintenance conditions.

The severity of the sanction provided for failure to comply with the maintenance or certification conditions—complete forfeiture of further warranty coverage—suggests, however, that the conditions may have additional purposes. Clearly a malfunction occurring in a car that has not been properly maintained could be caused by a manufacturing defect and not in any way aggravated by the lack of maintenance. If the malfunction is in a nonmoving part, this conclusion is almost inevitable. If protecting the manufacturers against paying for repairs caused by abuse were the only purpose of the maintenance and certification conditions, therefore, only the warranty coverage on parts likely to be affected by a lack of maintenance should be forfeited.⁵⁸ Perhaps even more appropriately, the failure to maintain a car properly or to obtain the requisite certification might give rise only to a rebuttable presumption that a subsequent malfunction was caused by abuse.⁵⁹ An effect of the maintenance and certification provisions, and possibly therefore an additional purpose for them, is to reduce the

another situation the owner might be asked to pay for the labor while the manufacturer and dealer split the cost of the part.

⁵⁸ General Motors has always conditioned just the five year warranty on performance of required maintenance and certification, and Ford adopted a similar provision in 1968. As a result these conditions do not affect warranty coverage on most of the parts that could not possibly be affected by a failure of required maintenance (e.g., body items). Anomalous results are nevertheless possible. For example, under the General Motors warranty the five year warranty coverage on wheels and wheel bearings could be forfeited for failure to change the engine oil every 60 days or 6,000 miles.

⁵⁹ In effect this was the rule under the two year warranties on all parts, without maintenance and certification conditions, that were issued by Ford and General Motors before the 1967 model year.

manufacturers' warranty expenses. This effect is obtained because a certain proportion of new car owners can be expected to neglect the maintenance of their car or fail to obtain the proper certification. The conditions may also serve to preserve owner good will in the sense that it is probably easier for most owners to accept the conclusion that a warranty repair cannot be made because he has not complied with the clearly stated conditions on warranty coverage than because the malfunction was caused by his abuse of the automobile. The manufacturers consider the certification requirement to be important also as a control against some owners' practice of turning back the mileage on a car in order to obtain an extension of the warranty coverage. If the mileage at a particular certification is less than or about the same as the mileage at an earlier certification, tampering with the odometer is presumed and warranty coverage will probably be cut off.⁶⁰ A final and very important purpose of the maintenance and certification conditions, however, is to promote business for the dealer. The manufacturers quite carefully provide that the maintenance services need not necessarily be performed by an authorized dealer. Nevertheless, the manufacturers and dealers, both orally and in writing, strongly urge owners to return the car to an authorized dealer for maintenance services, and with considerable success.⁶¹ The certification requirement also encourages owners to return to a dealer for the required maintenance services, since certification is almost automatic in that event. Moreover, an owner who returns regularly to his selling dealer for maintenance service or certification maintains continuing contact with that dealer. The manufacturers and dealers both consider continuing contact an important aid in selling the owner his next new car.⁶²

Because the sanction for violation of the maintenance or certification conditions is so severe, and perhaps because the certification and maintenance conditions appear to have such a variety of purposes, they are not always strictly enforced. I have found it difficult to determine, however, what considerations determine whether warranty coverage will be forfeited. Actually Ford and General Motors first instituted these conditions at the beginning of the 1967 model year when they adopted the five year warranty, and consequently at the time of my research they have not had much experience at administering the conditions. Chrysler imposed the conditions in the 1963 model year when they introduced the five year warranty, and although it is clear that Chrysler has not enforced the conditions literally, neither has it enunciated any other specific criteria for determining when warranty coverage will be

⁶⁰ This result is mandatory under the 1968 warranties of all three major manufacturers. They provide that the warranty will be voided if the odometer is altered in such a way that actual mileage cannot be determined.

⁶¹ See note 120 *infra* and accompanying text.

⁶² See AUTOMOTIVE NEWS, June 20, 1966, at 35, col. 3.

forfeited. Certainly, the severity of the breach is one relevant consideration; an owner 100 miles late in procuring maintenance services would almost never have his warranty coverage forfeited. Preservation of good will may be an even more important consideration.⁶³ I believe an owner who has regularly purchased new cars from a particular dealer would rarely lose his warranty coverage for breach of the maintenance or certification provisions except for gross neglect, and even then a dealer might well plead with the manufacturer to allow further warranty coverage. I gained the impression from interviews with dealers that the conditions are more strictly enforced against second owners. A purchaser of a used car is not normally considered as likely to purchase a new car in the reasonably near future and consequently his good will is considered less valuable.⁶⁴

⁶³ Good will may be important in another way besides determining the sanction for breach of the maintenance and certification conditions. One problem that arises in the enforcement of the certification provision concerns the owner who asks for certification but claims that he has lost his receipts showing that the required maintenance has been performed or that he performed the maintenance himself. A representative of one manufacturer has written me that "our instructions to dealers have been that even if slips of paper from independent service stations are not available, but the customer insists the work was done either by a service station or by himself, and in accordance with the Owner's Manual, the dealer, *in the exercise of good discretion*, can issue certification if his inspection of the vehicle and major parts of it would indicate that the maintenance probably had been performed." (emphasis added).

⁶⁴ This tendency probably reflects also the manufacturers' experience that warranty coverage for second and third owners is quite expensive. See generally note 15 *supra*.

In the early years of its five year warranty, one of Chrysler's greatest difficulties in enforcing the maintenance and certification conditions was caused by its system of keeping records of dealer certifications that maintenance services had been performed. Originally, the dealer placed his certification in a booklet which was retained by the owner and was supposed to be presented each time a warranty repair was requested. This system had two disadvantages from Chrysler's point of view. First, owners lost the booklet—often, the manufacturer feared, purposely because of noncompliance with the maintenance and certification conditions. Yet the manufacturers and dealers were understandably reluctant to deny warranty coverage just because the owner had lost the booklet. Second, because Chrysler itself kept no record of dealer certifications, it was a simple matter for the dealer to enter the certifications at any time but indicate that they had been entered at the proper time. A dealer would be motivated to act in that manner if the owner was an especially good customer or if the dealer had acquired a used car in trade and desired to resell it as a car under warranty. Chrysler has subsequently dealt with the first problem by attaching a card on which dealer certifications are to be made to the glove compartment. Chrysler, as well as the other manufacturers, are presently developing procedures to deal with the second problem by requiring the dealer or the owner to provide the manufacturer with notice of each certification that is made, together with the then current mileage. The manufacturers will place this information on computers where it will be readily available any time a question arises about whether the warranty has expired or the required certifications have been obtained. As the

3. DEALER UNWILLING OR UNABLE TO REPAIR

The most common complaint about warranty administration made by owners is that the dealer failed to repair the malfunction properly. One manufacturer told me that 40 percent of the complaints it receives from customers are of this nature. Responses to a written questionnaire sent by *Consumers Reports* to its readers indicated that the most common reason for dissatisfaction with warranty service is the dealer's failure to cooperate or inability to effect a successful repair.⁶⁵ According to my own survey, by far the most common difficulty experienced in obtaining warranty repairs was having to return the car several times before obtaining a proper repair.

There are several different reasons for the high number of complaints of this type. A common source of such complaints is customer dissatisfaction with a feature of the automobile that the manufacturer considers normal. Thus, an owner may complain of a noise in the rear axle, although when the car was designed the manufacturer specifically contemplated some noise of that nature. Another frequent complaint of this nature is poor gas mileage. A dealer usually receives complaints of this type shortly after delivery of the new car, a time when he does not wish to tell the new owner that his car is not designed to measure up to his expectations. Consequently, a dealer will often try to make some minor repair that will cause the car to operate more satisfactorily in the customer's view. If unsuccessful, the owner must then be told that the difficulty is in the vehicle's design and cannot be fixed. The fact that the dealer made an original attempt to repair, however, often convinces the owner that a defect really exists, and hence his complaint that the dealer is refusing to make a warranty repair. There is not much the manufacturer will do when it receives such a complaint concerning some feature of the car's design. It may have a service representative examine the car to be sure that the dealer's diagnosis is correct and that there is not a simple adjustment that can correct the annoyance.⁶⁶

manufacturers succeed in generating more effective checks on dealers and owners, it may be that they will begin enforcing the maintenance and certification provisions more rigorously than they have in the past.

⁶⁵ 1966 CONSUMERS REPORTS 170-71 (April); 1965 CONSUMERS REPORTS 174-75 (April). Recently *Consumers Reports* suggested that dealers are becoming more "cooperative" in helping owners secure an adequate warranty repair, although there still is a high incidence of dealer inability to effect a successful repair. 1967 CONSUMERS REPORTS 197 (April).

⁶⁶ A similar but more troubling situation can arise when an owner receives a car which is not defective, in the sense that it complies with the manufacturers' design, but which admittedly does not perform as well as most other cars of the same model. Each part which goes into an automobile is manufactured to specifications which permit certain deviations from the norm, known as tolerances. By the laws of probability certain automobiles will contain a large number of maximum tolerance parts. These

Another important cause of the high number of owner complaints about failure to obtain an adequate repair appears to be dealer unwillingness or apparent inability to repair a true manufacturing defect (by which I mean a failure by the manufacturer or dealer to deliver the car to the owner in the condition contemplated by its design). In some of my interviews, dealers told me that there are a few dealers who consciously refuse to make warranty repairs simply because warranty work is not as profitable as other service work, but I encountered no direct evidence of this practice.⁶⁷ It appears to be quite common, however, for dealers who do not consciously avoid their warranty responsibilities to fail to effect an adequate repair, at least at the first opportunity. To a large extent, of course, this is a problem that prevails throughout the automobile repair business. Yet the large number of such complaints suggests that the problem is more severe in the case of repairs under warranty. Although the reason for this failure is not altogether clear, it seems probable, and some dealers suggested, that the manufacturers' reimbursement policies are an important cause. Any reimbursement system based on flat rates—and many nonwarranty repairs are also paid for on a flat rate basis—will encourage a dealer to complete a repair as quickly as possible. The encouragement is more extreme, however, if the flat rates are stringent, as the dealers believe many of the current warranty rates are. The fact that commercial work is generally more profitable than warranty work has a similar effect. The capacity of many service shops is less than is needed to perform properly all the warranty and commercial work brought to them.⁶⁸ Consequently, acceptance of warranty work often requires the dealer to decline the more profitable commercial work. In my interviews the dealers also objected to the limited time allowed in the flat rates for diagnosis of the cause of a malfunction as not taking adequate account of some of the difficult diagnosis problems that can arise, especially if the owner has not been very precise in describing the nature of the malfunction.⁶⁹ Because compensation for diagnosis time is often inadequate and warranty repair work generally less profitable

cars will often have a number of unusual characteristics which are disturbing to certain owners. Although these characteristics do not exist on most cars, the manufacturers consider the car to operate within acceptable tolerance levels, and except for a few simple adjustments which may modify some of the disturbing features, there is little they or the dealers will do for an owner who demands warranty repairs on such a car.

⁶⁷ My failure to encounter this practice may be partly due to the fact that my interviews were limited to Wisconsin. Several dealers suggested that the practice is largely confined to high volume, low price dealers in large cities. The same dealers often commented that Milwaukee, where I did conduct interviews, was exceptional for its lack of dealers engaging in this practice.

⁶⁸ This, at least, is the opinion of the manufacturers' representatives that I interviewed. See also note 214 *infra* and accompanying text.

⁶⁹ See also *AUTOMOTIVE NEWS*, June 20, 1966, at 10, col. 1.

than other service work, dealers are naturally inclined to spend as little time as possible at both.⁷⁰ It is not surprising that in many cases the malfunction persists.

A large number of complaints in this category relate to requests for repair of dealer responsibility items. This fact offers further verification for the hypothesis that the reimbursement rates contribute to the high number of complaints about inadequate repairs. A substantial number of owner complaints about dealer unwillingness or inability to effect a repair on dealer responsibility items should be expected because many malfunctions that are considered the dealer's responsibility are rattles and noises, the causes of which are often difficult to diagnose, and because many claims for dealer responsibility repairs are denied on the grounds that normal deterioration or abnormal use caused the malfunction.⁷¹ It is generally agreed, however, that the manufacturers' policy of not reimbursing dealers for this type of repair is partly responsible for a high number of the warranty complaints associated with dealer responsibility items.⁷²

The manufacturers are aware of the large number of these kinds

⁷⁰ The precise manner in which the reimbursement rates have this effect differs according to how a dealer pays his mechanics, but the effect is always the same. Some dealers, particularly those in larger cities, pay their mechanics on "50-50" basis, which means the mechanics receive 50% of the amount for labor collected by the dealer on a job. That amount will likely be less on warranty work and accordingly the mechanics are encouraged to cut corners in order to finish the job as quickly as possible and proceed to more profitable work. In other dealerships the mechanics are paid on an hourly basis; so from a mechanic's point of view, warranty work is as profitable as other work. Warranty work is still less profitable to the dealer, however, and so he, and his service manager, will be encouraged to turn warranty work away at the door, to devote little time to diagnosis, and to urge mechanics to perform warranty work as quickly as possible.

⁷¹ Another reason for a high number of complaints about a failure to make these types of repairs is simply that a high percentage of requests for all types of warranty repairs concern dealer responsibility items. About 40% of the mechanical difficulties experienced by respondents to my survey concerned the need for minor adjustments in the engine or to body parts, nearly all of which would be considered dealer responsibility items.

⁷² *E.g.*, AUTOMOTIVE NEWS, June 21, 1965, at 30, col. 3; cf. CONSUMER BULLETIN, March, 1966, at 22.

Actually, the disputes associated with dealer responsibility items would probably be much more numerous except that the dealers have discovered various illicit ways to obtain reimbursement from the manufacturers for many of these repairs. Dealers will sometimes claim that what was in fact a pre-delivery type of repair was a repair for which the manufacturer should pay but which involved only the expenditure of labor. Because there are no parts to check, the manufacturers have considerable difficulty in disallowing such claims. Thus, a number of dealers told me that when receiving a request for repair of a wind noise around the windows—a dealer responsibility item—they will charge the repair to the manufacturer by characterizing it as a water leak, for the repair of which the manufacturers provide reimbursement.

of complaints and have adopted a few measures to reduce them. Their most substantial efforts seem directed at improving the accuracy of the initial diagnosis of malfunctions. Some manufacturers will in rare instances allow a dealer extra compensation for abnormal diagnosis time if the dealer can establish that diagnosis was exceptionally difficult. All the manufacturers encourage their dealers to contact a factory representative if they confront a difficult diagnosis problem and can afford to delay the repair, and normally the dealer is reimbursed for the time an employee spends with the service representative. Neither of these remedies is available to the dealer in the ordinary case, however. In response to dealer pressure, the manufacturers have also been gradually increasing the rate of reimbursement for warranty work, to the point where the labor rate sometimes equals the commercial rate.⁷³ The manufacturers are also regularly reviewing their flat rate times, and recently Ford even hired an independent concern to re-evaluate their rates. Another manufacturer policy is to refuse reimbursement for warranty repairs performed twice because the first repair was inadequate. The manufacturers argue that this "shop comeback" rule encourages dealers to repair a malfunction correctly the first time.⁷⁴ Another effect, of course, is to encourage a dealer to cut even more corners the second time around. Although these measures no doubt have some effect, a large number of these complaints still remain and the manufacturers' principal means for dealing with them is to correct individual abuses whenever an owner complains directly to them.

4. VISITING OWNERS

A visiting owner is one who requests warranty work from a dealer other than the one from whom he purchased the car. Under the General Motors and Chrysler warranties an owner is theoretically entitled to bring his car to any authorized dealer for warranty work.⁷⁵ The formal Ford warranty directs the owner to return to his selling dealer unless he has moved to a different locality or is traveling, in which event he may go to any authorized dealer. In practice Ford instructs its dealers to also perform warranty work for visiting owners if the car cannot be safely operated or if the selling dealer has subsequently gone out of business.⁷⁶

⁷³ See notes 38-39 *supra* and accompanying text.

⁷⁴ General Motors also has a program to encourage its dealers to make road tests on all cars after completing a repair and to charge one person with the responsibility for approving all repairs before the car is returned to the owner. The program is being sold to the dealers on the ground that it will reduce the dealer's expenses on "shop comebacks."

⁷⁵ More specifically, General Motors owners must return their automobiles to a dealer authorized to sell new cars of the same make, while Chrysler owners may go to a dealer authorized to sell new cars of any make manufactured by Chrysler.

⁷⁶ Ford also has an unpublished policy of replacing entire units rather

Most dealers do not welcome requests for warranty work from a visiting owner, because they do not make a profit on the work and they are not likely to sell him a new car in the future. Nevertheless, if the repair is one for which the manufacturer normally reimburses the dealer, most dealers will make warranty repairs for a visiting owner if he is traveling or has another good reason for not returning to his selling dealer. The dealers understand that other dealers are expected to perform warranty work for their purchasers. Furthermore, the dealers do not desire to anger the manufacturer by purposely failing to perform their warranty obligations.⁷⁷ There are two situations, however, in which a visiting owner will typically be denied a warranty repair. If the visiting owner resides nearby the dealer asked to make the warranty repair but purchased his car from a competing dealer located further away from the owner's residence, the dealer asked to make the repair will often refuse. Most dealers regard such an owner with considerable antipathy. Almost invariably the owner will be a "price shopper"—that is, an owner who buys from whichever dealer offers the lowest price. Accordingly there is little reason to gain his good will, for he will probably purchase his next new car from the dealer asked to make the repair only if that dealer offers the lowest price. Moreover, many dealers seem to believe they have a sort of unwritten right to make all sales of their particular make to owners residing within the area. This type of visiting owner has violated that unwritten rule. For these reasons, many dealers will direct him to return to the selling dealer for warranty work.⁷⁸ Under the Ford warranty the dealer has a perfect right to turn away this type of visiting owner and Ford makes no attempt to discourage the practice, although it will reimburse the dealer for the warranty repair if he chooses to make it and if it is a normally reimbursable repair. Under the General Motors and Chrysler warranties, an owner has a technical right to bring his car to any dealer for warranty work, but in practice these manufacturers make little effort to discourage their dealers from turning away a visiting owner in this situation.⁷⁹

than merely repairing a part in the unit, if replacement would be much more convenient for the visiting owner. Replacement is a much less time consuming operation than most repairs.

⁷⁷ See generally notes 41-42 *supra* and accompanying text.

The manufacturers also reserve the right to charge a dealer who refused to make a warranty repair for a visiting owner for the difference between the warranty reimbursement rate and the amount paid to the dealer by the customer. See note 43 *supra*.

⁷⁸ The principal exception to this statement occurs when the selling dealer has gone out of business. The other dealers apparently believe there is more purpose in generating good will in such circumstances.

⁷⁹ For example, one respondent in my survey, who lived in Milwaukee but bought his car in Door County (about 150 miles away), told of an occasion on which he asked a Milwaukee dealer to make a warranty repair on the molding around the windshield. The dealer told him to return to

The second situation in which a visiting owner will find it difficult to obtain a warranty repair is where the repair is a dealer responsibility item. Because the pre-delivery allowance is included in the selling price and therefore paid to the selling dealer, some of the manufacturers will reimburse a dealer in some circumstances for dealer responsibility work performed for a visiting owner. Nevertheless, most dealers appear to adopt a policy of never performing free dealer responsibility work for a visiting owner, even if the owner is traveling or has moved. The owner will be told to return to the selling dealer or to pay for the repair and present the bill to the selling dealer for reimbursement. Although frequently this action constitutes a denial of the owner's rights under the warranty, the manufacturers make little effort to alter this practice.

5. OVER WARRANTY COVERAGE

Anytime an owner requests warranty coverage when not entitled to it he is asking for over warranty coverage. In this section, however, I will discuss only the practice of offering some owners free repairs after the warranty period has expired. Repairs of this type are among those known in the trade as policy adjustments. There are essentially two situations in which an over warranty policy adjustment will be made. There are a number of items in a car, none of them covered by the five year warranty, that are not usually affected by the amount of mileage the car has been driven. On some of these items if the malfunction is reported within 24 months of delivery, whatever the vehicle's mileage, the manufacturers instruct their dealers to make free repairs uniformly for all owners and without the necessity of obtaining prior approval. Examples of such items are air conditioners, heaters and convertible top mechanisms.

Nearly all parts on a car are eligible for the second type of over warranty policy adjustment, but the dealer must always obtain the manufacturer's prior approval. The decision to make this type of policy adjustment is made on an ad hoc basis, but there appear to be several factors that are regularly taken into consideration. One is the extent to which the automobile is over warranty; a malfunction occurring only 2,000 miles after expiration of the warranty is much more likely to be repaired free than one occurring after 10,000 miles. Another important consideration is whether the part that has a malfunction is one "that should not have gone wrong." Since most parts in an automobile are designed to last longer than the warranty period, a malfunction occurring afterwards may be caused by a manufacturing defect, and in such circumstances the manufacturers tend to be sympathetic to an argument that the

the selling dealer. When the respondent contacted the manufacturer's regional office, they confirmed the dealer's instruction.

owner should not bear the cost of repair. Perhaps the most important consideration, however, here as elsewhere, is the value attached to preserving a particular owner's good will. The process of obtaining approval for this type of policy adjustment must be initiated by the dealer and they are not instructed to request a special adjustment in every possible case. Because warranty work is less profitable than commercial work, the dealer will ordinarily request a policy adjustment only if he thinks there are special good will benefits to be gained.

6. REMEDIES OTHER THAN REPAIR OR REPLACEMENT

Although the manufacturers limit the remedies under the express warranty to repair or replacement of defective parts, there are occasions in which owners request other remedies. Many of these requests end up in celebrated litigation for large monetary damages for personal injuries or property damage suffered in an accident allegedly caused by a manufacturing defect and are beyond the scope of this article. Three types of more modest claims that are technically barred by the limitation of remedies provision do have a more direct bearing on warranty administration. I have discussed the dispute settling procedures for these claims in another article,⁸⁰ however, and so only the briefest mention of them will be made here.

Occasionally an owner becomes so discouraged with his car that he believes that there is no satisfactory remedy short of replacement of the entire automobile. But aside from rare exceptions usually made to preserve good will, the manufacturers will never offer an owner a new car. If a malfunction caused by a manufacturing defect in a particular part causes further malfunctions in other parts, themselves properly manufactured, only the part that was defective in manufacture would be repaired free of charge under a literal application of the warranty. As a matter of practice, however, the manufacturers repair free of charge all damage to the vehicle directly caused by a defectively manufactured part that is still covered by the warranty. Thus, if a part covered by the five year portion of the warranty malfunctions and causes damage to parts covered only by the two year warranty, all the parts will be repaired free of charge even though the two year warranty has expired.⁸¹ Finally, there are a number of monetary losses that an owner may suffer if his automobile becomes inoperable due to a manufacturing defect. Thus, it may be necessary to have the car

⁸⁰ Whitford, *Strict Products Liability and the Automobile Industry: Much Ado About Nothing*, 1968 Wis. L. Rev. 83.

⁸¹ There is no coverage in the opposite situation, however. If a part covered only by the two year warranty malfunctions after the two year warranty has expired and damages a part covered by the five year warranty, none of the damaged parts will ordinarily be repaired under the warranty.

towed to a service shop, the owner may need to rent a substitute vehicle while his is being repaired, or a malfunction rendering the car inoperable or unsafe to operate may have to be repaired commercially if no authorized dealer is located in the immediate vicinity. As a general rule the manufacturers will not reimburse an owner for any of these expenses. The principal exception is that towing costs are regularly refunded if the owner does not carry insurance covering such expenses.⁸² Occasionally a manufacturer will also reimburse an owner for the expense of emergency repairs obtained from other than an authorized dealer.

C. Summary of Factors Influencing Warranty Administration

The most important determinant of the decision whether to honor an owner's request for a warranty repair is clearly the content of the formal warranty. With certain exceptions the manufacturers and dealers make a bona fide effort to respect their legal obligations. The respondents to my survey told about 314 instances in which they had requested a warranty repair. In only 51 (about 16 percent) of these instances were the respondents unsuccessful in obtaining a repair,⁸³ and no doubt many of these denials were justified on the facts. Why the manufacturers and dealers make this effort to live up to the warranty is not so clear. Partly, of course, their willingness can be attributed to the fact that the manufacturers have largely unfettered discretion to draft the warranty anyway they like. Consequently, they can make sure it does not include any promises that they would prefer not to perform. Nevertheless, it would obviously save the manufacturers and dealers money if they more or less regularly refused to make legitimate warranty repairs. And if they did, the fear of adverse court judgments should not concern them for very few warranty disputes go to court, and it is highly unlikely many would regardless of the attitude the manufacturers and dealers took toward warranty administration. The expense of legal action is simply too great—particularly since it would usually be necessary to hire an expert witness to establish that a manufacturing defect in fact existed—to motivate most owners to sue for a possible recovery of no more than a few hundred dollars.⁸⁴ Fear of a legislative or administra-

⁸² Only towing costs to the nearest authorized dealer are eligible for reimbursement.

⁸³ In another 12 instances the respondent indicated that a repair was made, but it was not clear whether the respondent paid for the repair.

⁸⁴ Every lawyer in Wisconsin with whom I discussed this problem indicated that they would advise a client not to sue because of the expenses of litigation. A few respondents to my survey indicated that their lawyers had advised them similarly. In an effort to increase the potential recovery, many owners who choose to sue seek as a remedy rescission of the sales contract and return of the purchase price. See Whitford, *supra* note 80, at 134-39. Even so, some plaintiffs consider the satisfaction gained from winning a court action against an automobile manufacturer to be one of

tive agency response to a ruthless administration of the warranty would be a more realistic worry for the manufacturers. Automobiles are a very important possession to most consumers and any evident abuse in their production or distribution is bound to create political pressure for reforms.⁸⁵ Probably the major motivation for the manufacturers' attitude towards their warranty obligation, however, derives from the internal dynamics of the sales transaction with the owner. A major strategy of the manufacturers in promoting the sale of new cars is to generate a sense of brand loyalty in owners so that they will purchase new cars of the same make in the future. Owner respect for the good faith of the manufacturer and dealer is essential to the maintenance of brand loyalty, and, of course, an owner denied a warranty repair for what he thinks are inadequate reasons is not likely to believe in that good faith.

The content of the formal warranty is not the only determinant of warranty administration decisions, however. There are a significant number of requests for warranty repairs that are denied, and, judging by the current public clamor about warranty administration,⁸⁶ some of these denials must be unjustified. There are an even greater number of cases in which owners encounter difficulties, such as delays, in obtaining warranty repairs. In my survey the respondents reported 48 separate instances in which they experienced difficulty in obtaining a warranty repair, although the repair was eventually made under the warranty.⁸⁷ The most frequent difficulty experienced was the necessity to return the car to the dealer several times. At an immediate level the occurrence of most of these problem cases can be explained by such inevitable phenomena as errors in judgment—for example, in diagnosing the cause of a malfunction. However, there appear to be a number of factors that affect the frequency with which such instances occur and that help determine in which cases improper denials or delays in obtaining warranty repairs are more likely to occur. Many of these same factors also influence the decisions on the claims for warranty repairs that raise close questions for which there is no clearly correct decision—for example, in those cases when it is difficult to determine whether a malfunction was caused by misuse or a manufacturing defect—and the decisions to offer free repairs for malfunctions that are clearly not covered by the warranty.

Some of the most important of the factors affecting the fre-

the principal benefits of a successful lawsuit. See *Wall Street Journal*, July 21, 1965, at 10, col. 2.

⁸⁵ Even now, there are a number of proposals for regulation of warranty administration. See notes 155-75 *infra* and accompanying text.

⁸⁶ See, e.g., 1967 CONSUMER REPORTS 194 (April); *Wall Street Journal*, April 25, 1967, at 1, col. 6.

⁸⁷ See note 83 *supra*.

quency and incidence of improper denials of warranty repairs are byproducts of the extensive bureaucracy the manufacturers have established to administer the millions of warranty contracts they enter each year. A bureaucracy needs guidelines to govern the decisions of line officials and the manufacturers have found many of the more general terms of the formal warranty, such as the misuse and normal deterioration limitations, to be insufficient guides. As a result, they have communicated more specific rules to dealers—for example, that paint and appearance items will not usually be repaired under warranty after a stipulated mileage. Bureaucracy also needs systems by which higher echelon officials can control the decisions of line officials, and thus the manufacturers have established numerous devices to control the dealers' decisions on warranty coverage—for example, prior approval must be obtained from the manufacturer before certain repairs can be made under warranty. In what the sociologists call goal displacement,⁸⁸ these needs of the bureaucratic system sometimes take precedence over the bureaucracy's external goal of even-handed administration of the warranty. Thus, dealers will often consider defects in paint or appearance items that manifest themselves after six or seven thousand miles to be caused by misuse or normal deterioration without even checking for the remote possibility of a manufacturing defect. Similarly, I gained the impression from my interviews with dealers that the extra paper work and delay required to obtain prior approval sometimes induces dealers simply to tell an owner that a repair requiring prior approval is not covered by the warranty. This effect is more likely to be observed among small volume dealers who have insufficient warranty work to induce them to establish efficient procedures for handling all the paperwork associated with warranty administration.⁸⁹

There are a number of other bureaucratic policies adopted by the manufacturers which have a distorting effect on the achievement of even-handed warranty administration. Many of these policies were adopted to further the manufacturers' control over decisionmaking by the dealer. Another purpose of many of the policies is to achieve a second external goal of the warranty administration bureaucracy, the minimization of warranty costs. This goal redounds to the benefit of owners generally, since warranty costs

⁸⁸ See generally R. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 197-200 (Rev. ed. 1957). Cf. G. ALLPORT, *PERSONALITY* 190-213 (1937).

⁸⁹ The paperwork associated with filing claims for reimbursement of warranty work is so great that a number of commercial firms have been established that assist dealers in preparing such claims. A dealer using the services of such a firm will send it information about the repair made and the parts replaced, and the firm then determines the applicable flat rate, calculates the total amount of reimbursement due, and fills in the form provided by the manufacturer for this purpose. The firm will also remind the dealer about any necessary supporting documents, such as a written authorization in the case of prior approval items.

are included in the purchase price of a new car, but its inclusion as a goal in the bureaucratic system has had certain distorting effects on the achievement of the other external goal of fair and even-handed application of the warranty. Thus, in order to minimize warranty costs, and partly as a general control over dealers' decisions, the manufacturers reimburse a dealer for warranty work at a rate below that which he can usually receive for commercial work and base their reimbursement on a flat rate system. The manufacturers have also designated certain repairs as dealer responsibility items for which they will provide no reimbursement. This policy serves two purposes. It works as a control of the quality of the dealers' pre-delivery conditioning. It also serves to minimize warranty costs, since there are so many dealer responsibility repairs requested, most of them minor, that the cost of administering a reimbursement system would be quite high. It seems probable that these two reimbursement policies are largely responsible for the great number of owner complaints that the dealer was unwilling or unable to repair the malfunction. These bureaucratic policies also affect the types of owners and malfunctions that are most likely to encounter problems. Thus, the reimbursement policies are largely responsible for the frequent denial of the rights of visiting owners under the warranty. Similarly, the practice of requiring prior approval of certain minor items, such as paint and appearance items, probably has caused more problems to arise with respect to requests for such repairs.⁹⁰

The characteristics of the dealership asked to make the initial determination of coverage is another determinant of warranty decisions. Dealers differ considerably in the quality of warranty services they offer their purchasers. Some of these differences seem to depend on the size of the dealership. Thus, small dealers are less likely to make requests for prior approval of a warranty repair because they have difficulty in coping with the additional paper work prior approval entails,⁹¹ and large dealers are more likely to establish special rules concerning the limitations on repair of dealer responsibility items.⁹² Differences attributable to size hardly account for all the differences in the quality of war-

⁹⁰ In my survey I discovered that a statistically significant higher percentage of residents of large cities than of other locales reported that they had had mechanical difficulties with their new cars. Seventy-three percent of residents of large cities reported experiencing mechanical difficulties with their new cars whereas only 52% of residents of other locales reported such experiences. This is a statistically significant difference: X^2 (1 d.f.) = 9.9, $p < .005$. For a description of the Chi-Square (X^2) test, see note 121 *infra*. Residents of large cities were also more likely to be denied warranty repairs to which they believed themselves entitled, but not to an extent disproportionate with the higher number of mechanical difficulties they experienced.

⁹¹ See note 89 *supra* and accompanying text.

⁹² See text following note 55 *supra*.

ranty services offered by different dealers, but I have found it difficult to determine the nature of the other factors. In my interviews I detected a difference in the strategies for selling new cars adopted by large volume dealers, and this difference may be related to differences in the quality of warranty service. In devising ways of attracting purchasers of new cars, some large dealers tend to emphasize the importance of building up a group of customers who regularly purchase their cars from them. Other large dealers seem to rely mostly on offering lower prices to attract purchasers. These latter dealers may well attach less importance to the quality of their warranty service than the former ones, since they perceive a less harmful effect on new sales resulting from dissatisfied warranty customers. Consequently, they may pay less attention to owner complaints about bad warranty service, they probably are less likely to construct service shops large enough to handle the warranty business in addition to the more attractive commercial repair work, and they may make a less substantial effort to hire quality personnel for the service department. These differences in selling strategies seem much less pronounced between small volume rural dealers. These dealers cannot afford to exclude categories of owners who might not be attracted to a particular selling strategy, and they are better able to acquire knowledge about each prospective purchaser and adapt their sales approach to meet the individual's proclivities. The differences in the quality of warranty service offered by small rural dealers, therefore, is probably mostly attributable to the differences in the administrative and business skills of the dealer, the amount of capital he can invest in his business, and similar factors. My impression is that small dealers tend to differ in a more pronounced manner in factors of this nature than do large dealers.

A large number of factors affecting decisions about warranty coverage concern the characteristics of the owner who is requesting a warranty repair. The most important of these characteristics is the value of his good will, as seen from the point of view of the dealer and manufacturer. Several factors enter into the determination by dealers and manufacturers about whether an owner's good will is worth preserving (or establishing) by offering especially good warranty service. The most important factor is whether he is likely to purchase new cars in the future.⁹³ It is also important that the owner can be relied on not to bargain too hard in negotiating for the purchase of new cars in the future.⁹⁴

⁹³ The more new cars an owner is likely to purchase, the more valuable his good will becomes. Thus, preservation of the good will of fleet owners, who purchase several new cars each year, is usually considered most important, the preservation of the good will of an owner who buys a new car every year or two next most important, and so forth.

⁹⁴ The following comment was made in an article appearing in *Automotive News*, a dealer trade newspaper, discussing practices with regard to

An owner who bargains hard on the price is not as profitable a customer to the dealer, and he also is likely to consider price the most important factor in deciding from which dealer to buy his next car. Accordingly, the prospects of making a future sale cannot be increased much by offering him especially good warranty service. Apparently a few dealers also consider the likelihood that an owner will become a regular service customer in evaluating the worth of his good will. Thus, one Milwaukee dealer indicated that he would consider performing dealer responsibility warranty repairs for a visiting owner if he thought the owner might become a regular service customer.

There are a number of reasons why preservation of good will has become an important determinant of warranty coverage. In some instances the manufacturers have designated good will as an explicit criterion in determining eligibility for a free repair, the principal example being over warranty policy adjustments. It seems likely, moreover, that the manufacturers' seemingly purposeful vagueness about the criteria to be employed in determining warranty coverage for some other repairs is designed to allow use of good will considerations. For example, the manufacturers have not articulated any rules for determining when warranty coverage should be terminated for breach of the maintenance and certification conditions, and consequently good will considerations will very probably become an important consideration. More generally, the manufacturers are constantly reminding the dealers to bend nearly all rules in favor of owners with good will of high value.⁹⁵ Perhaps the most important reason good will is such an important determinant of warranty coverage, however, is that it is an inevitable byproduct of the bureaucratic policies adopted by the manufacturers. For example, the rate of reimbursement and the policy about dealer responsibility items necessarily make dealers reluctant to make warranty repairs unless there are some additional benefits, such as an increased likelihood of selling another new car. It is highly unlikely that the favoritism that is afforded owners whose good will is valued could be eliminated so long as the manufacturers' reimbursement policies remain as they are.

Another characteristic of owners that appears to affect the out-

dealer responsibility items:

One thing is certain, this is the customer who will get the most from any dealer—the owner with a valid complaint who was reasonable when he bought the car, who returns to his selling dealer and who is reasonable in his attitude when he asks for the free service.

The more a customer departs from the characteristics outlined above, the less he is likely to get.

AUTOMOTIVE NEWS, June 21, 1965, at 30, col. 3.

⁹⁵ "The fundamental aim in warranty service and policy adjustments is to improve customer relations—to assist the dealer in developing customer loyalty through customer satisfaction." FORD MOTOR COMPANY, WARRANTY AND POLICY MANUAL FOR AUTHORIZED FORD AND LINCOLN-MERCURY DEALERS, at introduction (1963).

come of decisions about warranty coverage is aggressiveness, by which I mean the owner's inclination to challenge an initial denial of a warranty repair. An aggressive owner is more likely to obtain a warranty repair for at least two reasons. Aggressive owners more often convey the impression that a denial of a warranty repair will have a substantial harmful effect on their feelings of good will towards the dealer and manufacturer. An aggressive owner is also more likely to force an independent evaluation of his claim by someone other than the initial decisionmaker—usually the dealer's service manager—because he raises a more evident threat of loss of good will and because he persists in demanding such an evaluation. One of the most effective ways of challenging a denial of a warranty repair appears to be a letter of complaint to the manufacturer, since such a letter usually insures that a person outside the dealership will independently evaluate the owner's claim for a warranty repair. By far the greatest number of manifestations of owner aggressiveness occur at the dealership level, however. Thus, in my survey I recorded 99 separate instances in which the respondents encountered some difficulty in obtaining a warranty repair on their new car. In 74 of these instances the respondents indicated they had made some attempt to overcome the difficulty through responses limited to the dealership. If the owner's complaint is an inadequate repair rather than a complete denial of one, the most likely response at this level is simply to return the car to the dealer to give him further opportunities to make a proper repair. In other situations an owner might argue about the propriety of the initial denial of a warranty repair with the service manager and, if that is unsuccessful, then perhaps another official in the dealership, such as the sales manager or the dealer himself.⁹⁶

IV. NORMATIVE EVALUATION OF THE WARRANTY ADMINISTRATION PROCESS

Having described the patterns of dispute settlement under the automobile warranty, I propose in the balance of this article to discuss in what ways the legal system could most effectively alter those patterns. It is necessary first, however, to evaluate the patterns of dispute settlement in terms of a number of the norms that have been suggested by courts and commentators for determining the validity or "justice" of consumer transactions. This evaluation is necessary to identify the changes in the patterns of dispute settlement that somebody might wish to effectuate through use of the legal system.

⁹⁶ A very common approach by owners is to contact the salesman who sold them their car. The salesman, unlike the sales manager, usually has no direct authority to reverse a decision by the service manager, but he can use persuasion.

One norm that could be applied to dispute settlement under the automobile warranty is the nearly universally held norm that contracts should be performed—*pacta sunt servanda*. This norm is violated, of course, anytime an owner is improperly denied a warranty repair. This occurs, for example, when a dealer erroneously determines that a malfunction was caused by abnormal use, when a dealer does not make the repair because of apparent inability to do so, or when visiting owners have trouble obtaining warranty repairs.

There are a number of norms, often considered specially applicable to consumer transactions, that consider the validity of the contractual terms themselves. These norms can also be applied to evaluate many of the manufacturers' practices in administering the warranty and to such general determinants of dispute settlement as good will and owner aggressiveness. The various norms of this type that have been suggested fall generally into two categories. One category consists of norms that condition the validity of contractual terms unfavorable to the consumer on the seller's conveying notice about them. Holders of these norms place a high value on freedom of contract, typically because they doubt the ability of outsiders to the transaction to devise rules that are fairer and better adapted to the needs of the parties than the rules determined by the parties themselves. Of course, most consumer contracts are standardized form contracts that make little effort to take account of the consumers' special needs, but standardized form contracts can and do take account of the special needs of the seller and his administrative bureaucracy.⁹⁷ Although disregard of the terms of a standardized form contract is considered impermissible for this reason, many holders of these norms are willing to insure that consumer contracts are truly agreed upon by requiring notice. Notice can be important to the consumer. If the terms are too unfavorable, he may decide not to buy. Alternatively, he may be able to take action independent of the contract that will reduce the risks thrust upon him, such as purchasing insurance. Making the validity of the terms of a consumer contract conditional upon notice is not considered inconsistent with freedom of contract, since, if the seller regards a term as essential to its bureaucratic needs, it can insure the term's validity by conveying notice.⁹⁸ The other category consists of norms that evaluate the validity of consumer transactions according to a substantive determination by persons not parties to the contract of the fairness or wisdom of its terms. Holders of these norms, therefore, are willing to substi-

⁹⁷ See, e.g., Llewellyn, Book Review, 52 HARV. L. REV. 700 (1939).

⁹⁸ Some examples of commentators advocating norms requiring notice are: Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966); Barber, *Government and the Consumer*, 64 MICH. L. REV. 1203 (1966).

tute their judgment about what terms best meet the mutual needs of the parties for the judgment of the parties, or more realistically for the judgment of the seller.

A. In Terms of Norms Emphasizing Notice

In evaluating provisions in a consumer contract in terms of notice, it is useful to distinguish between notice given by the dominant party—usually the seller—and notice received by the adhering party. Either concept could be used in applying notice norms. By notice given I mean all attempts by the dominant party to convey awareness of the contract's provisions to the adhering party. Thus, notice given includes not only the printed contract itself but also all advertisements and other literature discussing the contract terms and any verbal explanations made to the adhering party. By notice received I mean the knowledge of the contract terms that is actually absorbed by the adhering party. Notice received can potentially be derived from many sources and may not necessarily be a product of the dominant party's efforts at notice giving. It is theoretically possible that the dominant party will make almost no effort to give notice about a particular contract provision and yet the adhering party will have knowledge of its content.

1. NORMS EMPHASIZING NOTICES GIVEN

In point of time, notice giving about the automobile warranty usually begins with advertisements.⁹⁹ Due to requirements imposed by the Federal Trade Commission¹⁰⁰ the advertising always mentions the maintenance and certification conditions and contains some indication that the five year warranty does not apply to all parts, but mention is rarely made of the other conditions and limitations on warranty coverage.¹⁰¹ The next attempt at notice giving is usually made by the salesman during his sales presentation. In my interviews at a number of dealerships in southern Wisconsin, salesmen told me that although they would explain the warranty details prior to the signing of sales contract if an owner

⁹⁹ Chrysler advertised its warranty very extensively when it was the only major manufacturer offering a five year warranty. Since the reintroduction of a generally uniform warranty in 1967, my impression is that the amount of advertising mentioning the warranty has declined considerably.

¹⁰⁰ Although the FTC's advisory opinions are confidential, it is well known in the industry that FTC has been in contact with the manufacturers concerning their warranty advertisements. See *AUTOMOTIVE NEWS*, June 20, 1966, at 6; FTC Advisory Opinion Digest No. 63 (June 22, 1966).

¹⁰¹ The advertisements also state that defective parts will be repaired or replaced by an authorized dealer, but the exclusivity of that remedy is not emphasized. A very few advertisements reproduce the entire warranty but the reproduction is in small print and no particular emphasis is given to it.

requested, ordinarily they only mentioned the major limitations, such as the limited coverage of the five year warranty and the maintenance conditions. The typical sales contract does not include the formal warranty but only mentions, in fine print, that one of the terms of the sale is the manufacturer's new car warranty, and that the warranty contains the only promises relating to the quality of the vehicle sold. Each dealer decides on the form of his own sales contract, however, and occasionally a dealer will decide to reproduce all or part of the warranty, usually on the back side of the form.

The manufacturers and the dealers usually make their major effort to give notice about the warranty at the time the new car is delivered to the owner, ordinarily a week after signing the sales contract. At this time the owner is provided with a manual prepared by the manufacturer that contains the only copy of the formal warranty typically available to the owner, some explanation of it, and operating and maintenance instructions for the new automobile. The formal warranty is usually reproduced on a single page in fairly small print (as is necessary if it is to be entirely reproduced on a single page) and little effort is made to emphasize the crucial conditions and limitations, but an effort has been made to avoid technical legal language where possible.¹⁰² Immediately following the formal warranty the manuals contain an explanation of some of the rights and obligations under the warranty. Each manufacturer's explanation emphasizes the maintenance and certification conditions. Owners are encouraged to have the required maintenance operations performed at the dealer's service shop but no manufacturer states explicitly that they must be performed there. Each manufacturer provides examples of repairs and service operations that will be considered normal maintenance and deterioration (a number of examples are also provided in the formal warranty itself).¹⁰³ Ford is the only manufacturer to mention specifically any special mileage limitation on dealer respon-

¹⁰² In order to comply with section 2-316(2) of the Uniform Commercial Code, the disclaimer paragraph is printed in a manner that makes it stand apart from the rest of the warranty. See Whitford, *supra* note 80, at 142 n.188. In addition Chrysler has headings at the beginning of each major section of the warranty. In no other respect, however, could it be said that the formal warranties are "conspicuous" as defined by section 1-201(10) of the Uniform Commercial Code. For the content of the formal warranty, see notes 15-24 *supra* and accompanying text. The formal warranties uniformly omit mention of special mileage restrictions such as those on dealer responsibility items.

¹⁰³ Examples of the excluded repairs mentioned in the formal warranties are replacement of spark plugs and brake linings, wheel alignment and normal deterioration of soft trim due to wear and exposure. This listing of repairs is supplemented by further explanation and listing in the owner's manual, but the detail contained in the owner's manual varies considerably between manufacturers. Chrysler's explanation is the briefest and in my view Ford has the best explanation.

sibility items. General Motors and Ford urge their owners to call any imperfections in paint or appearance items to the selling dealer's attention as soon as possible; Chrysler apparently believes special restrictions on these items are implied in the general limitation on normal maintenance and deterioration.

In addition to the owner's manual, dealers, at the manufacturers' urgings, frequently make an oral explanation of the warranty at the time of delivery. The extent of the oral explanation varies greatly but usually an effort will be made to explain the maintenance and certification conditions and to urge that the owner return to the selling dealer regularly for his maintenance services. It is also common for a dealer to explain about the owner's responsibility for normal maintenance and deterioration, and, as one might expect, dealers are usually more concerned than the manufacturers to give notice about special mileage limitations on dealer responsibility items. In addition to the verbal explanations some larger dealers have prepared their own written material to be distributed at delivery explaining in large type the more important restrictions on warranty coverage.¹⁰⁴ In an effort to determine how often and how completely dealers explain the warranty at this time, I also asked the respondents to my survey of new car purchasers whether "anyone at the dealership . . . ever explained to you the provisions of the warranty?" Fifty-five percent of the respondents replied affirmatively. I also asked whether certain specific features of the warranty were explained. The percentage of affirmative responses to these specific questions are shown in the following table.

¹⁰⁴ The written material prepared by one dealer I interviewed even mentioned the lack of warranty coverage for parts damaged by misuse. Usually most of the emphasis is on the lack of warranty coverage for owner responsibility items (e.g., engine tune ups, lubrication and oil change) and on the special mileage limitations on repairs of dealer responsibility items.

Larger dealers are much more likely to prepare their own warranty explanations than smaller dealers partly because they are better able to afford it. Another reason is that larger dealers are less capable of administering a policy of free repairs for owner responsibility and dealer responsibility items on a flexible basis that depends on the value of the particular owner's good will. See text following note 55 *supra*. Consequently, larger dealers perceive a greater need to convey notice about these limitations in order to lessen the ill effects on preservation of good will caused by a system of fixed rules. See text following note 105 *infra*.

TABLE I
Explanation of Specific Features of Warranty

Specific Feature	Percent of Affirmative Responses
Length of warranty	53
Limitation on five year warranty	41
Maintenance and certification conditions	48
Owner responsibility for normal maintenance	45
Special provisions about rattles, etc.	25
Misuse condition	38

It is clear, therefore, that the manufacturers and many dealers make substantial efforts to give notice about most of the conditions and limitations on the warranty, although a major part of the efforts occurs after an owner has signed the contract. The rather low percentage of respondents to my survey who had the benefit of an oral explanation from the dealer is rather disappointing,¹⁰⁵ but it must be remembered that asking owners whether the warranty was explained to them when their car was delivered four or five months previously is not a very accurate means for determining whether an explanation was in fact given. The reason the manufacturers and dealers make such extensive efforts to give notice became quite clear in my interviews with them. They are not concerned with preserving the legality of their warranty practices, for very few disputes ever go to court, nor does the

¹⁰⁵ A majority of the respondents to whom the warranty provisions had been explained orally also stated in response to another question in the interview that the explanation occurred before they actually bought the car. My interviews with salesmen indicated that it was not common for warranty details to be explained at this time. The respondents in my survey were purchasers of 1967 models, however, and since General Motors and Ford had just introduced the five year warranty, it is likely that their dealers were concerned that this new feature be explained in the course of the sales presentation so as to eliminate Chrysler's previous competitive advantage. The somewhat lower percentage of respondents who indicated that specific warranty limitations were explained to them suggests that at least some of the owners who reported that they received an oral explanation were referring only to this type of general discussion of the length of the warranty in the course of a sales presentation. If so, then an even lower percentage of the owners interviewed received an oral explanation of the major limitations on warranty coverage.

Another possible explanation for the high percentage of explanations before purchase reported by the respondents is based on the form of the question in the interview asking about the timing of the oral explanation. This question asked whether the oral explanation was made before buying or at delivery. Many owners probably discussed the general nature of the warranty in the course of the sales presentation and then received a detailed explanation at delivery. It may be that when faced with the alternative of identifying one time or the other as the time of the explanation, most of these owners responded that the explanation was made before buying.

issue of notice enter the informal dispute settlements. The manufacturers and dealers are vitally concerned, however, with preventing disputes, and disputes often arise because an owner misunderstands the limitations on the warranty. When such a dispute arises from misunderstanding, the manufacturers and dealers must either deny a repair and lose good will or extend extra warranty coverage, which may be expensive. Neither alternative is appealing to them.

This pattern of notice giving raises several legal issues concerning the application of norms emphasizing notice given. The first concerns the manufacturers' timing of notice giving. One of the important purposes for requiring notice is to enable purchasers to make a determination about whether to enter into the transaction based on knowledge of all the risks. This suggests that notice should be given prior to legal commitment. Yet specific notice of many of the conditions to the warranty is not given until the owner's manual is distributed or an oral explanation is made at the time of delivery, that is, after the contract is signed. The sales contract often mentions, in fine print, that the manufacturer's new car warranty is a part of the transaction and some courts have held that a general reference to a set of rules available only on request to the purchaser at the time of sale is sufficient to satisfy notice norms.¹⁰⁶ Those decisions should probably be limited, however, to situations where it is not bureaucratically practical to provide copies of all the rules to each buyer. There does not appear to be any reason why a new car purchaser could not be provided with a copy of the formal warranty, if not more, at or before the time he is asked to sign a sales contract.¹⁰⁷

Another important issue raised by notice giving norms is whether notice is required for the many specialized rules developed to aid in application of the general limitations on warranty coverage. These specialized rules include the usual exclusion of

¹⁰⁶ See, e.g., *Thompson v. L.M. & S. Ry.*, [1930] 1 K.B. 41 (1929); *Commissioner for Transport v. Kenya Co-operative Creameries, Ltd.*, 21 E. Afr. C.A. 70 (C.A. Eastern Afr. 1954). But cf. *Klar v. H. & M. Parcel Room*, 296 N.Y. 1044, 73 N.E.2d 912 (1947).

¹⁰⁷ What I refer to as the sales contract usually provides that the order is not binding on the company until it is countersigned by a representative of the dealer authorized to accept offers, thereby probably making the owner only an offeror. Although this "offer" is invariably "accepted" by the appropriate official prior to delivery, often no effort is made to communicate this acceptance to the owner before delivery. An argument can be made, therefore, that the contract is not complete until delivery, and that the owner's manual and the dealer's oral explanation is provided to the owner before or at the time of contract formation. Moreover, as a matter of practice many dealers will allow owners to withdraw a promise to buy without penalty at any time before delivery. Nevertheless, clearly most owners consider themselves bound, and forgo any further weighing of the risks they are encountering, at the time they sign the sales contract, and a requirement of more notice giving before that time can be supported for that reason.

warranty repairs on certain parts, such as the brake and clutch linings, the mileage limitations on dealer responsibility repairs, and the general bias against warranty repairs for paint and other malfunctions. The formal warranties of all the manufacturers fail to mention these specialized rules, although the written explanation in the owner's manual and oral explanations include some of these rules.¹⁰⁸ The question whether notice of these rules should be given arises because the rules tend to acquire a binding nature of their own quite apart from the general provisions they purport to interpret; after 6,000 miles a Ford dealer is likely to refuse to repair under warranty a burned out brake lining without first checking the possibility, unlikely but not negligible, that the malfunction was caused by a manufacturing defect. When these rules are applied to deny a warranty repair even though the malfunction is clearly caused by a manufacturing defect, there is probably a denial of contract rights even if notice of the special rules is provided in the written and oral warranty explanations.¹⁰⁹ The usual reasons for requiring notice may apply nevertheless. The techniques presently available for rectifying denial of contract rights—principally the courts—are clearly inadequate to the task. An owner may find it useful, therefore, to know he may be denied his contractual rights when he decides whether to purchase a car or plans ways to reduce the risks he assumes. It is much more common, however, to apply the special rules when it is not clearly determinable whether the malfunction was caused by a manufacturing defect. In these cases the special rules operate to reverse the usual presumption that a malfunction occurring within the warranty period is caused by a manufacturing defect in the absence of concrete evidence to the contrary.¹¹⁰ The special rules still play an important role in determining the extent of effective warranty

¹⁰⁸ See note 103 *supra*.

¹⁰⁹ Where there is a conflict between the formal warranty and the written oral explanation of it, the provisions of the formal warranty should presumably prevail. Some owners may read the formal warranty to learn about their rights and obligations and rely on their reasonable understanding of its meaning, and that reliance would seem justifiable. The attitude of the dealers I interviewed is different, however. On a number of occasions when I was told about special limitations on warranty repairs of dealer responsibility items, paint and the like, I suggested that nothing was said about such matters in the warranty. The invariable reply was that it most certainly was and I was referred to the explanation part of the owner's manual where such limitations are mentioned. The attitude was that the "warranty" was not just a formal document but rather everything said about warranty in the owner's manual. Certainly such an attitude is disturbing to a contract lawyer schooled in the importance of formalities and the parol evidence rule, but in the context of a consumer transaction the dealers' attitude may make some sense. Most automobile owners, if they have a question about the warranty, will surely turn to the explanation in the owner's manual rather than try to interpret the vague and somewhat technical language of the formal warranty itself.

¹¹⁰ See note 53 *supra* and accompanying text.

coverage, therefore, and the usual reasons for requiring notice remain applicable.

A similar issue of notice giving is raised by the manufacturers' failure to provide notice about the administrative procedures and generalized considerations that affect the substantive disposition of warranty claims, such as the necessity of obtaining prior approval for some repairs, the desire to preserve good will, and owner aggressiveness. This information could be useful to a consumer contemplating purchase of a new car or devising ways to reduce the risks imposed by the sales contract. Many owners fail to write a letter of complaint to the manufacturer about unsatisfactory warranty service simply because they are unaware of the potential efficacy of this avenue of relief. And an owner who appreciates the importance of good will considerations might well decide to buy regularly from the same dealer or not to bargain too hard about the price. The manufacturers and dealers would certainly not welcome a requirement that they inform owners of the importance of good will and aggressiveness because, in some instances, they might subsequently have to tell customers that their good will is not valuable enough to give them a free repair. It can be argued, however, that if a seller is reluctant to state the buyer's rights and obligations because he fears the buyers will think them unfair, he should be forced either to alter the rights and obligations or to bear the consequences.

A final problem of notice giving concerns the manufacturers' failure to provide information about the common problem of a dealer who is unwilling or unable to make an adequate warranty repair or about the usual difficulties a visiting owner encounters obtaining a warranty repair. Although this information concerns denials of contractual rights,¹¹¹ clearly the knowledge could be useful to a prospective new car purchaser who is weighing the value of the warranty in deciding whether to buy. It is sometimes argued that rather than requiring a seller to negate the promises in a warranty by stating that they are often not performed, in such circumstances a seller should be prevented from claiming he gives a warranty at all. The reasoning underlying this argument, resembling the reasoning behind notice received norms, is that many purchasers will assume they are receiving something of value

¹¹¹ Although Chrysler and General Motors both state in their formal warranty that an owner can obtain warranty repairs from any authorized dealer, Chrysler, in its warranty explanation in the owner's manual, clearly suggests that warranty repairs are only available from the selling dealer, unless the owner is traveling or has moved. General Motors does almost the same in its owner's manual by "recommending" that warranty service be performed at the selling dealer's service shop in similar circumstances, "because of the Selling Dealer's continued and personal interest in you." These suggestions and recommendations in the owner's manual at least comport with reality, but the provisions of the formal warranty probably prevail in determining contract rights. See note 109 *supra*.

merely from the use of the word "warranty," even if subsequent qualification indicates the warranty is largely worthless.¹¹² Presumably, however, this argument would be applied to ban completely mention of the automobile warranty only if the incidence of nonperformance of warranty obligations were considerably higher than it now is. For most purchasers the automobile warranty could hardly be considered worthless. The argument might be applied more restrictively to forbid issuance of a warranty to purchasers from a dealer who has been especially poor at living up to the warranty. More generally, the manufacturers might be required to state in the formal warranty that visiting owners receive warranty protection only if they are traveling or have moved, since as a practical matter most dealers fail to provide warranty repairs for visiting owners in any other circumstances.¹¹³

2. NORMS EMPHASIZING NOTICE RECEIVED

The respondents in my survey were asked several questions to measure the amount of notice received about the conditions and limitations on the warranty. To test their knowledge of the length of the warranty, they were asked how long their warranty lasted (question 1), whether the length was the same for all parts (question 2), and, if the response was negative, what parts were covered by what different warranty periods (question 3). They were also asked what, if any, maintenance services were required to keep the warranty in force (question 4) and where those maintenance operations could be performed (question 5). To test knowledge of the misuse and normal deterioration conditions, and the special mileage limitations on dealer responsibility repairs, I put a series of hypothetical situations to the respondents and asked if they would expect warranty repair in those circumstances. The normal deterioration condition was tested with questions that hypothesized the wearing out of the brake linings after 17,000 miles (question 6) and a breakdown in the clutch after 12,000 miles (question 7).¹¹⁴ Knowledge of the misuse condition was tested by hypothesizing an owner who noticed his engine overheating while pulling a heavy trailer and shortly thereafter discovered that the engine was leaking oil and needed new valves (question 8). Knowledge of the special limitations on dealer responsibility items was tested by hypothesizing the development of a loud rattle after 10,000 miles (question 9). In none of these situations would an

¹¹² See FTC, GUIDES AGAINST DECEPTIVE ADVERTISING OF GUARANTEES § VI (1960); notes 197-200 *infra* and accompanying text.

¹¹³ Ford already so states. The manufacturers might also be compelled to indicate that visiting owners will not receive dealer responsibility repairs. See text following note 79 *supra*.

¹¹⁴ The question about the breakdown of the clutch was addressed only to respondents whose most recently purchased new car had a manual transmission. There were 65 such respondents.

owner be likely to obtain a repair under warranty, although on rare occasions a dealer would make an investigation to determine whether the particular defect was caused by a manufacturing defect.¹¹⁵

The following table indicates the percentage of correct, incorrect and "don't know" answers to the above questions. It was possible to categorize some of the answers to the questions about the different warranty periods for different parts (question 3) and the maintenance requirements (question 4) as partly correct,¹¹⁶ but for the other questions all positive answers were categorized as correct or incorrect.

TABLE II
Notice Received About Warranty Conditions

Question	Percent			
	Correct	Partly Correct	Incorrect	Don't Know or inapplicable. ¹¹⁷
1 (warranty length)	64	—	31	4
2 (warranty uniform)	64	—	18	18
3 (how not uniform)	43	10	4	43
4 (maintenance required)	34	40	22	4
5 (where servicing)	37	—	53	10
6 (brake linings)	50	—	44	7
7 (clutch) ¹¹⁸	35	—	60	5
8 (new valves)	48	—	46	6
9 (rattle)	42 ¹¹⁹	—	57	2

¹¹⁵ In categorizing the responses to questions 6 through 9 for purposes of Table II, I counted as correct a response indicating that a warranty repair would not be made or a response indicating that the answer depended on whether the malfunction was caused by a manufacturing defect.

¹¹⁶ Categorized as a partly correct answer to question 3 were responses demonstrating basic knowledge that there was a two year warranty on nearly all parts and an additional five year warranty on some parts but which evidenced a material although not complete misunderstanding about what parts were covered by the five year warranty. I considered a response to question 4 to be partly correct if it demonstrated accurate knowledge of the frequency at which maintenance services were required or of the nature of the required services but not both.

¹¹⁷ "Inapplicable" means that the respondent was not asked the particular question. For example, a respondent who indicated that the warranty period was uniform for all parts in response to question 2 was not asked question 3 about what parts were covered by what different periods. With the exception of question 7 concerning a breakdown in the clutch, the reason a particular question was not put to a respondent was always that it was clear he would not have known the correct answer. Consequently, the percentages for all the questions except 7 listed in Table II are based on the total sample of 286 respondents. Respondents whose most recently purchased new car had an automatic transmission were not asked question 7 because they would never have had an occasion to request a clutch repair and therefore would have had no reason to receive notice about the special limitations on such repairs. I did not categorize these respondents

Several interesting observations can be made about this data. It is more important that owners receive more notice about the maintenance condition than about the other conditions tested because that condition requires affirmative owner action to keep the warranty in force. And there appears to be a great deal of notice received about the maintenance condition. Nearly 75 percent of the respondents gave a correct or partly correct answer to question 4. Perhaps more significantly, 92 percent of the owners knew that maintenance conditions existed (four percent indicated there were no maintenance conditions, and another four percent indicated they did not know whether maintenance conditions existed). If an owner knows there are maintenance conditions, he may check with his dealer or in the owner's manual to determine what operations must be performed and at what frequencies. On the other hand, there appears to be a great deal of misunderstanding about where these maintenance operations can be performed (question 5). Over 50 percent of the respondents thought they had to be performed at the selling dealer or at any authorized dealer.¹²⁰ It is not difficult to guess the reason for this high degree of misunderstanding. Both the owner's manual and the dealers' verbal explanations stress the desirability of having the work performed by a dealer, and many owners must misconstrue these urgings to be commands.

A breakdown of the data by the make of car indicates that a significantly greater number of Plymouth owners answered questions 4 and 5 correctly than did owners of other makes.¹²¹ The

as inapplicable, and the percentages listed in Table II for this question are based on the 65 respondents who were asked the question.

¹¹⁸ The percentages for this question are based on the 65 respondents who were asked this question. See note 117 *supra*.

¹¹⁹ This percentage may be inflated. Due to an error in the drafting of the questionnaire, respondents who answered "depends" to this question were not asked "On what does it depend?" Consequently, I decided to assume that all these respondents, if asked, would have replied that it depends on whether the rattle was caused by a manufacturing defect and categorized all "depends" responses as correct. Twelve per cent of the respondents answered "depends" to this question.

¹²⁰ Nine percent of the respondents thought that the required servicing could only be performed by the selling dealer and 43 percent thought it could be performed by any authorized dealer.

¹²¹ If all respondents are classified according to whether they owned a Plymouth or another make, regardless of place of residence, and tabulated with their answers to question 4 about the nature of the required maintenance services, one finds that approximately 54% of Plymouth owners answered this question correctly while only about 24% of other owners answered it correctly. This is a significant difference: X^2 (1 d.f.) = 20, $p < .005$. Chi-Square (X^2) is a measure of the dependence of two variables, here the percentage of respondents giving a correct answer to question 4 and the make of car purchased. Probability less than .005 ($p < .005$) means that the probability is less than five parts in a thousand that a value of X^2 greater than 20 would be obtained if there were no dependency between the two variables (i.e., the null hypothesis). This probability

same is true about question 1. Since I have not been able to detect that Chrysler and their dealers make superior efforts at notice giving,¹²² this finding suggests that the amount of notice received by owners is determined in part by factors other than the notice given at the time of sale. I have not been able to determine what factors other than notice giving account for the greater amount of notice received by Plymouth owners. At least two possibilities come to mind, however. Before the 1967 model year Chrysler was the only manufacturer to offer a five year warranty and to condition the continuing validity of the warranty on the performance of required maintenance. In my interviews the manufacturers and dealers suggested that even in 1967 many purchasers believed Chrysler offered the "best" warranty because of its uniqueness before 1967. For that reason prospective purchasers concerned about warranty coverage, and who therefore probably received more notice about the warranty, may have been more likely to purchase Chrysler products in 1967.¹²³ The second possible explanation re-

strongly suggests that the high value of X^2 indicated above did not result from chance but rather because there is some dependency between the two variables (i.e., the null hypothesis is rejected). See generally R. STEEL & J. TORRIE, *PRINCIPLES AND PROCEDURES OF STATISTICS* 31-43, 305-31, 346-51 (1960).

If the respondents are classified similarly and tabulated with their responses to question 5 about where the required maintenance services can be performed, one finds that about 50% of Plymouth owners answered this question correctly whereas only about 31% of other owners answered it correctly. This is also a significant difference: X^2 (1 d.f.) = 9.4, $p < .005$.

I also found that the type of community in which the respondent resided correlated significantly with correct responses to question 5, with residents of large cities providing about 45% correct answers, residents of medium cities 40% correct answers, and residents of rural areas 27% correct answers. X^2 (2 d.f.) = 8.15, $p < .025$. Because the sample was stratified by make of car and type of community, both variables are independent (i.e., the two significant correlations with correct answers to question 5 cannot be explained on the ground that most of the Plymouth owners interviewed lived in large cities, since the Plymouth owners interviewed were divided, roughly equally, between residents of the three types of communities, or that most of the rural residents interviewed were Ford or Chevrolet owners, since the rural residents were divided about equally between owners of the three makes of cars). See note 13 *supra* and accompanying text. I have no explanation for the correlation between residence and responses to question 5. The finding would be consistent with a hypothesis that large volume dealers, who sell mostly to residents of cities, are more likely to make extensive efforts to convey notice, since they find it more difficult than small volume dealers to administer the warranty limitations on a flexible basis depending on the value of preserving each owner's good will. See text following note 55 *supra*. I found no other significant correlations between notice received and place of residence, however.

¹²² There is not a significant correlation between owners of the different makes and oral explanations by the dealer of the warranty provisions.

¹²³ Another survey established that in 1965 and 1966, when Chrysler was the only manufacturer offering a five year warranty, a higher percent of Chrysler owners were aware of the length of their warranty before pur-

lies on the established fact that a high percentage of new car buyers purchase the make they previously owned.¹²⁴ Accordingly more Plymouth owners in my survey than other owners had probably owned a car with a five year warranty conditioned on the performance of required maintenance. This prior experience may well have contributed to the greater amount of notice received.

Another interesting observation about the data concerns the two questions about the normal deterioration limitation. A significantly higher percentage of respondents answered correctly the question about wearing out of the brake lining (question 6) than the question about a breakdown in the clutch (question 7), although both involved application of the same general warranty limitation.¹²⁵ There are several possible explanations for this find-

chase than other owners. MARKET RESEARCH DIV., ADVERTISING DEP'T, U.S. NEWS & WORLD REP., *THE BUYERS OF NEW AUTOMOBILES 1962-1966*, at 46-47 (1966).

¹²⁴ LOOK, *NATIONAL AUTOMOBILE AND TIRE SURVEY 1965*, at 36-39 (1965).

¹²⁵ Using the formula for determining the significance of the difference between two proportions that the 5% confidence interval $d \pm 1.96$

$\sqrt{\frac{c(1-c)}{N_c} + \frac{b(1-b)}{N_b}}$, where $d = b - c$, and b and c are proportions based on

sample sizes N_b and N_c , the 5% confidence interval = $.14 \pm .13$. Since this interval excludes zero, the probability is 95 parts out of 100 that the difference in the proportions of correct responses to the brake and clutch questions (50% and 35%) were not caused by sampling error. Stated otherwise, if in the true population (Wisconsin purchasers of Chevrolets, Fords and Plymouths) owners received notice about the nonavailability of clutch repairs under warranty at least as often as they received notice about the nonavailability of brake lining repairs, then the probability that in a randomly selected sample of the size used in my survey I would find as many more owners who received notice about brake linings than received notice about clutches as I in fact found would be less than 5 parts out of 100. For a general discussion of this type of statistical test, see J. MUELLER & K. SCHUESSLER, *STATISTICAL REASONING IN SOCIOLOGY* 399-401 (1961).

Although a significantly higher number of owners receive notice about the nonavailability of warranty repairs for brake linings than for clutches, it is also true that an owner who receives notice about the nonavailability of warranty repairs for one of these items is more likely than the balance of the population to receive notice about the nonavailability of warranty repairs for the other. If only the subsample who answered the clutch question is considered, the breakdown of their responses to the clutch and brake lining questions is as follows:

BRAKE LINING RESPONSE				
		correct	other	total
CLUTCH RESPONSE	correct	16	7	23
	other	17	25	42
	total	33	32	65

X^2 (1d.f) = 3.93, $p < .05$, indicating a dependence between the responses to the brake lining question and the responses to the clutch question. Although technically the chi-square test only demonstrates a dependence between the variables, it is clear that the dependence is in the direction that a correct response to one of the questions means a correct response to the other question is more likely. Using the normal approximation to

ing. Many owners may not learn about the generalized normal deterioration limitation but nevertheless learn from some source—perhaps from personal experience or friends—that particular repairs are not covered. Since owners probably request brake lining repairs more often than clutch repairs, owners receiving notice in this manner would be more likely to learn about the limitation on repair of brake linings under the warranty. Another possibility is that something besides knowledge of the general principle is necessary to understand the manner in which the normal deterioration limitation is applied in particular circumstances. For example, some knowledge of the mechanical workings of the car may be necessary to enable an owner to understand what particular malfunctions are considered normal deterioration, misuse, and so forth. The existence of this possibility strengthens the argument advanced earlier that the manufacturers should be required to give notice of the many special rules they have developed for the application of the generalized warranty limitations,¹²⁶ since notice about the general normal deterioration limitation may be meaningful to an owner lacking the requisite mechanical knowledge only if it is stated in terms of concrete repairs not covered by the warranty.

An interesting legal issue arising from this data is how much notice received should be considered sufficient to satisfy norms emphasizing notice received. An individualized standard to the effect that the conditions and limitations are objectionable only if the owner receives notice of them is probably undesirable.¹²⁷ In the first place, such a rule would be almost impossible to administer, since in practice the only evidence of whether notice was received would be the owner's own testimony. Secondly, since the amount of notice received is not entirely within the control of the manufacturers such a rule could put the manufacturers in a very difficult position. A manufacturer may make extensive efforts to give notice about a warranty limitation that is unobjectionable on substantive grounds and that is essential to the manufacturer's bureaucratic system of warranty administration, yet if a particular owner failed to receive notice of the limitation it would be unenforceable.

the hypergeometric distribution, $z = 1.98$, $p < .025$ as a one-tailed test.

There are several possible explanations for this finding of dependency. Perhaps many owners receive notice about the general normal deterioration condition and are able to apply it to reach correct conclusions in concrete situations. Alternatively, if notice received about the nonavailability of warranty repairs in specific situations of abuse, etc., is dependent on characteristics of the owner other than knowledge of the general normal deterioration limitation, then possession of the characteristics that permit an owner to know about brake linings (an example might be mechanical knowledge) may indicate possession of the characteristics that permit an owner to know about clutches. See generally the subsequent text discussion.

¹²⁶ See text accompanying 110 *supra*.

¹²⁷ An individualized standard of this type would undoubtedly be applied under notice giving norms.

If notice received norms are to be applied, therefore, it is probably necessary to adopt as a standard some percentage of all owners who must receive notice of a warranty provision, with the provision being considered either enforceable or unenforceable against all owners.

In determining the appropriate standard, the amount of notice received that it is feasible to expect the manufacturers to convey should not control. It is implicit in the adoption of notice received norms that a warranty condition will be objectionable if despite the manufacturers' best efforts to convey notice a sufficient number of owners fail to receive it. Otherwise the notice received norm would be little more than a norm requiring the manufacturers to give notice in the most effective manner. On the other hand, it is not necessary to set the same standard for all warranty conditions. It would be quite appropriate to vary the percentage of owners who must receive notice according to how important it is to the owner to receive notice of the particular provision. For example, a higher degree of notice received might be required for the maintenance condition, which necessitates affirmative action by the owner, than for the normal deterioration limitation.

B. In Terms of Substantive Norms

There are a multitude of possible substantive norms for evaluating a consumer transaction and I shall attempt in this subsection to apply only those norms I consider most important. It should be borne in mind that proponents of these norms do not necessarily consider them the exclusive test of the validity of the patterns of dispute settlement under the automobile warranty. It would be quite possible to argue, for example, that no warranty condition or pattern of dispute settlement is valid unless notice is given by the manufacturer, but that even if notice is given, the condition or pattern must satisfy certain substantive tests. Alternatively, it might be argued that warranty provisions can be banned on substantive grounds only if they have not been "agreed upon" in the sense that owners have not received notice.

There appears to be increasing agreement that it is proper to invalidate terms in standardized form contracts involving a consumer that are very one-sided and for which there is no evident commercial justification. Section 2-302 of the Uniform Commercial Code, which authorizes a court to refuse to enforce "unconscionable" contract clauses, may be an example of such a norm.¹²⁸ Litiga-

¹²⁸ Section 2-302 only *may* be such a norm because it is unclear whether the Code's concept of "unconscionability" embodies substantive norms or only notice norms. See, e.g., Cudahy, *Limitation of Warranty Under the Uniform Commercial Code*, 47 MARQ. L. REV. 127 (1963); Hawkland, *Limitation of Warranty Under the Uniform Commercial Code*, 11 HOW. L.J. 28 (1965); Note, *Unconscionable Contracts Under the Uniform Commercial Code*, 109 U. PA. L. REV. 401 (1961).

tion involving the disclaimer clause in the automobile warranties has played an important role in the increasing acceptance of these norms, and at least part of the disclaimer clause probably should be considered invalid under such norms.¹²⁹ The only other provisions of the warranty that might lack substantial commercial justification are the maintenance and certification conditions. Certainly there will be instances in which minor departures in the performance of these conditions will not raise a substantial possibility of misuse or of fraud in the procurement of the maintenance receipts. Moreover, the severity of the sanction—complete termination of warranty coverage—invites the selectivity in its imposition which in practice occurs and raises the disturbing possibility that decisions to enforce the maintenance and certification conditions are based on factors that may not be considered proper, such as the desirability of preserving an owner's good will. The manufacturers justify the forfeiture on the ground of ease in administration. They assert that the costs of determining in each case whether a malfunction was caused by the failure of servicing would exceed whatever benefits would flow from a system that would allow the possibility that it was not. This justification would not seem so applicable to parts that are quite unlikely to be affected by a failure of servicing, however. Consequently, there is justification for requiring the manufacturers to restrict the operation of the maintenance and certification conditions to circumstances where a significant possibility of an adverse effect arises from a failure to comply with them.¹³⁰

Other substantive norms require more extensive disregard of the terms of the standardized form contract. A good example is the set of related norms, often known as enterprise liability theory and loss spreading, that have been developed principally with reference to celebrated products liability disputes arising from personal injuries to consumers but that can be applied to problems of automobile warranty administration as well. The number of proponents of enterprise liability theory has grown substantially in recent years and we have the benefit of their sometimes divergent views in numerous articles.¹³¹ Accordingly, I will not attempt here to explain this sophisticated theory in any detail.

¹²⁹ See Whitford, *supra* note 80, at 141-60.

¹³⁰ See note 58 *supra*.

¹³¹ The best exposition of these theories can be found in three articles by Professor Calabresi. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965); Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 216 (1965). See also Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961); Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974, 1004-12 (1966). But see W. BLUM & H. KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE

Briefly, enterprise liability theory holds that most activities, such as automobile manufacturing, will necessarily introduce costs to society, including the costs of repairing the manufacturing defects that will inevitably exist in many automobiles. It is important that these costs be borne by parties participating in the activity. Otherwise, the costs to an individual of participating in the activity will be less than the true proportionate costs of that activity to society, and the market mechanisms for determining what quantities of goods and services are produced and purchased will not function properly. In the case of automobiles, if the costs of manufacturing defects were borne by some third party—say the government—then the costs of purchasing and operating an automobile would be less than its true costs to society, and consequently some people would purchase cars although a car's marginal utility to them was less than its true cost. This results in an uneconomic allocation of resources. Moreover, it reduces the incentive on the participants in the activity of manufacturing and using cars to adopt measures to reduce the costs of manufacturing defects.

In a world in which everybody made perfectly economic decisions, it would not matter on which participant to impose the costs of manufacturing defects originally. If they were imposed originally on owners, the owners would take account of them by balancing the marginal utility of a new car against its total costs; the manufacturers would be encouraged to reduce the incidence of manufacturing defects in order to reduce the total costs and thereby increase the sale of cars. In practice, however, the world does not work that way. Most owners do not possess the expertise to enable them to place an accurate value on the risk of manufacturing defects in deciding whether the marginal utility of the automobile will exceed its true costs to them.¹³² Accordingly, most enterprise

LAW PROBLEM—AUTO COMPENSATION PLANS (1965); Blum & Kalven, *The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence*, 34 U. CHI. L. REV. 239 (1967).

¹³² For purposes of enterprise liability theory, it does not matter whether owners overestimate or underestimate the risk of manufacturing defects in calculating the true costs of a new car. If owners underestimate the risk, they will tend to buy too many new cars at the expense of other activities, such as buying used cars or taking trains. Moreover, the manufacturers would have insufficient incentive to reduce the risks of defects by adopting more careful manufacturing procedures; in an effort to reduce the incidence of defects, a manufacturer would quickly reach the point where the cost of the effort exceeded the extra profits from new sales generated by the defect reducing campaign. If owners overestimate the risk of manufacturing defects, then they will tend to buy too few new cars given their utility to society, and manufacturers will be induced to spend more on defect reducing campaigns than it would cost them to absorb the costs of the malfunctions caused by the defects eliminated. This last argument assumes, perhaps erroneously, that there are accurate mechanisms for determining the costs of a malfunction. The mechanisms in use today are probably deficient in calculating the costs that should be attributed to the inconvenience caused to an owner by a malfunction. See notes 81-82 *supra* and accompanying text.

liability theorists would consider it more efficient to impose the costs of manufacturing defects in the first instance on the manufacturers, who presumably possess the necessary expertise.¹³³ For the reasons it is not proper to impose the costs initially on owners, these costs should be imposed on the manufacturer quite irrespective of the terms of the standardized form contract. The result of applying enterprise liability theory to consumer transactions, therefore, resembles the result under the more simplified loss spreading norms held by many courts and commentators today, that would have the manufacturers initially assume the costs of defects so that a few arbitrarily selected owners will not have to bear the entire loss.

Before imposing unavoidable liability for manufacturing defects on the manufacturer, it is important under enterprise liability theory to be sure that the costs that are charged to the manufacturers and passed on to the consumer are truly attributable to the activity of automobile manufacturing and not more properly attributable to some other activity. Otherwise automobile manufacturing in effect will be subsidizing the other activity, and the market mechanisms for determining the marginal costs and benefits of that activity will not work properly. Thus, it would be inappropriate to expect the manufacturers to distribute to all car owners the costs of repairing a car that had competed in a tough motor rally; those costs should be attributed to the activity of motor rallying.¹³⁴ The more subcategories of activities (such as motor rallying) to which costs should be attributed that are established, the more difficult and expensive it is to determine to which activity to attribute a particular cost. At some point subcategorization will become so extensive that the costs of administering an enterprise liability system will equal the benefits of more precise matchings of the marginal utility and costs of various activities derived from the

¹³³ In order for a system imposing the initial costs of defects on owners to work perfectly, enterprise liability theorists have to assume that the manufacturers will pass the costs on to owners in the form of higher prices. This may not be a valid assumption in the case of the automobile industry. It is generally conceded that General Motors is a price leader in the industry and that for political and other reasons (many of them antitrust considerations) General Motors does not set the price for its products on a strictly economic basis. Nevertheless, there are reports that the costs of administering the warranty have been reflected in the increases in new car prices in recent years. *Wall Street Journal*, April 25, 1967, at 1, col. 6; *id.*, at 18, col. 3. It may be that car prices are not perfectly cost elastic, however. If not, then enterprise liability will not establish a perfect balance between the marginal utility of new cars and their total costs, and it will not provide the proper amount of incentive to manufacturers to initiate programs to reduce the incidence of defects.

¹³⁴ In the 1968 East Africa Safari, reputedly the world's toughest motor rally, only seven of nearly 100 entrants finished. Many of those who dropped out did so for mechanical reasons. The car which placed second arrived at the finish line with no clutch, defective brakes, a windshield held on by a rope, and doors that would not open.

extensive subcategorization, and presumably it would then be desirable to call a halt to further subcategorization. Until that point is reached, however, as a general rule it can be said that the costs should be attributed to a particular activity only if all participants share the risk of incurring those costs to an approximately equal extent.

It is clear that enterprise liability theory supports the basic concept of an automobile warranty promising repair or replacement of defective parts. The mileage limitations on the coverage of the automobile warranty may be more questionable, since according to enterprise liability theory the manufacturers should initially bear the costs of repairing all malfunctions caused by an abnormality in the manufacture or assembly of the part.¹³⁵ Such a proposition assumes, however, that it is usually possible to determine when an abnormality in a part has been a major cause of a malfunction. In practice this determination is difficult, and it is complicated by the fact that the owner's manner of operating the vehicle is often at least a contributing cause of the malfunction. Frequently when the determination is difficult the owner is given the benefit of the doubt, and a warranty repair is made.¹³⁶ Because many of these malfunctions are at least partly caused by the manner of operation, the effect is that the manufacturers absorb the costs of these repairs and distribute them equally to all owners, although the risk that the repairs will be necessary would not fall equally on all owners if there were no warranty. In terms of enterprise liability theory, it might be more appropriate to attribute many of these costs to the activity of operating an automobile in a particular manner rather than to automobile manufacturing. The more miles an automobile has been driven, of course, the more likely it is that at least one important cause of a malfunction is the manner of operation. One justification for mileage limitations, therefore, is that they may provide the only administratively feasible rule of thumb for separating malfunctions caused principally by the manner of operation from malfunctions caused in significant part by manufacturing abnormalities. If this justification is accepted, however, it in turn questions the precise limitations presently in force. Warranty periods have been radically extended in recent years and there may be some basis for concluding that they are now too long. Representatives of one manufacturer told me that if the car contains a manufacturing defect that will produce a malfunction regardless of the manner of operation, the malfunction will usually occur fairly early in the car's life. If this self-serving

¹³⁵ This statement assumes, as is in fact the case, that many parts in a new car are designed to operate normally for a more extensive period than the mileage limitations on the warranty. A malfunction occurring after the expiration of the warranty could be caused by a manufacturing defect, therefore.

¹³⁶ See note 53 *supra* and accompanying text.

statement is accurate, the result of a shorter warranty period would be less distribution of risks that are not shared equally by all owners (malfunctions caused in significant part by the manner of operation) while all car owners would continue to pay in the purchase price a proportional share of most of the costs caused by those risks which they bear equally (malfunctions caused almost solely by manufacturing defects).

Enterprise liability theory supports most of the formal conditions and limitations on warranty coverage. The misuse condition helps insure that costs that should be attributed to the activity of operating a vehicle in a particular manner are not included in the costs of automobile manufacturing. The maintenance and certification conditions can be similarly justified, although there is reason to conclude that the conditions are drafted too broadly.¹³⁷ The manufacturers not only condition warranty coverage on performance of the stipulated maintenance services but they require owners to pay for those services. The latter requirement is not necessarily inconsistent with enterprise liability theory. Since all owners need the same maintenance services at the same intervals, the distribution of costs among owners would be the same if the maintenance services were covered by the warranty. On the other hand, because maintenance services are regularly needed regardless of the manner of operation, it would also be consistent with enterprise liability theory to include the maintenance services in the warranty.¹³⁸ Most of the other servicing or repairs excluded from the warranty as normal maintenance or deterioration properly could only be excluded, however. They are required by malfunctions which occur at different frequencies according to the manner of operation. A good example is brake linings, which wear out much more quickly if the car is operated by a driver who makes many sudden stops. If replacement of worn out brake linings was included in the warranty, owners who operated their cars in a manner requiring infrequent replacement of the brake linings would in effect be subsidizing those who operated their cars more recklessly.

It is more difficult to apply enterprise liability theory to evaluate the appropriateness of the factors affecting dispute settlement other than the rules in the formal warranty. Many of these factors, for example the specialized rules for applying the general-

¹³⁷ See note 130 *supra* and accompanying text.

¹³⁸ If it is assumed that the manufacturers would accurately reflect the costs to them of performing the maintenance services in the purchase price, then it would be better to have the manufacturers absorb these costs in the first instance, since it would help owners to weigh more accurately the marginal utility of a new car to them against its total costs. *But see* note 133 *supra*. Such a system for distributing the costs of required maintenance services would give rise to additional antitrust objections to the warranty, however. See text accompanying note 152 *infra*.

ized warranty limitations, tend to encourage dispute settlements that are contrary to the rules in the formal warranty. Since the formal warranty is on the whole consistent with enterprise liability theory, these factors are somewhat suspect and it may be desirable to minimize their influence. It is possible, however, that all means for minimizing the influence of some of these factors will aggravate the incidence of some other deviation from the pattern of dispute settlement suggested by enterprise liability theory. For example, elimination of the specialized rules regarding paint may encourage dealers to award more warranty repairs of that nature to valued customers in circumstances where the malfunction was mostly caused by the manner in which the car was operated. Moreover, many of these factors, such as manufacturers' reimbursement policies, have the important subsidiary effect—which benefits all automobile owners—of reducing the costs of warranty administration. Most enterprise liability theorists recognize the need to sanction some deviation from the optimum allocation of risks for the sake of a more economic administration of the liability system.¹³⁹

Owner aggressiveness and good will help determine in which cases warranty repairs will be improperly denied and influence the decisions reached in close cases under the formal warranty. Very little is known about the characteristics of owners who respond aggressively to the initial denial of a warranty repair. It is possible that the chief determinant is the degree to which the dealer's initial denial is considered clearly wrong. In that event it would only help ensure that dispute settlements were consistent with the general rules for determining warranty coverage that are mostly consistent with enterprise liability theory. I would guess, however, that personality characteristics unrelated to the manner in which an owner operates his vehicle are more important determinants of owner aggressiveness than the merits of the dispute. If so, enterprise liability theorists should seek means to reduce the role of aggressiveness in dispute settlement.

It is more difficult to evaluate the role of good will. It seems highly unlikely that owners whose good will is valued regularly operate their automobiles in a manner less likely to cause malfunctions. Good will is also an important determinant of which owners receive over warranty policy adjustments. Although the dealers and manufacturers might argue that these policy adjustments are in the nature of gifts, the expense of making policy adjustments must be met out of the dealers' and manufacturers' income, and that income is principally derived from the sale of new cars. Accordingly, contrary to the usual tenets of enterprise liability theory, all owners in some sense help pay for policy adjustments that are generally available only to a few. Because of the reasons dealers

¹³⁹ E.g., Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 216, 235-36 (1965).

and manufacturers value the good will of certain owners, however, it is difficult to conclude categorically that good will is an undesirable influence in warranty decisions. An owner often acquires good will because he does not bargain hard on the price when purchasing his new car or because he is a regular purchaser of new cars or both. These owners tend to pay more for their cars, either directly to the dealers in the form of a higher purchase price or indirectly to both in that the regular purchase of cars offers the security of future profits that justifies further investment of capital. This additional payment could be considered as an insurance premium for the additional warranty coverage extended to these owners.¹⁴⁰

The analysis on the last few pages, which is based on enterprise liability theory, supports the basic structure of the current automobile warranty on the assumption that the administrative costs of categorizing malfunctions into those caused mostly by manufacturing defects and those caused mostly by the manner of operation do not exceed the benefits of categorization. An enterprise liability theorist might argue that the costs of categorization are too high,¹⁴¹ in terms of the expense in running the bureaucracy that must be established and of the number of "wrong" categorizations that are made, and that consequently it would be more efficient to

¹⁴⁰ A byproduct of the important role of good will in determining warranty coverage is the visiting owner problem. It is clear that according to enterprise liability theory an owner who is on a trip or who has changed his residence should receive just as much warranty coverage, even as to dealer responsibility items, as any other owner. There is nothing about this owner's circumstances that indicates he is more likely to experience malfunctions. On the other hand, a dealer may be justified by enterprise liability theory (although not by the formal warranty in the case of Chrysler and General Motors dealers) in refusing to make warranty repairs for an owner who resides nearby but purchased his car from a less conveniently located dealer. The typical reason an owner will purchase a car from a more distant dealer is that he gets a better price. Often the selling dealer was able to offer a lower price because he could rely on the buyer's finding it too inconvenient to return his car for the many minor repairs, usually of a dealer responsibility nature, that most dealers have to anticipate. In return for this lower price, the owner can be viewed as having accepted less complete warranty coverage, particularly as to dealer responsibility items.

The different qualities of warranty service offered by different dealers can be at least partly justified on similar grounds. One of the most important determinants of the quality of a dealer's warranty services is his strategy in attracting purchasers of new cars. Dealers who try to build up a clientele who regularly purchase new cars from them tend to offer owners good warranty service. Other dealers, who rely mostly on low prices to attract new customers, do not place so much emphasis on offering high quality warranty services, but purchasers from these dealers tend to pay less for their cars. In return they receive, in effect, less extensive warranty coverage. See text following note 92 *supra*.

¹⁴¹ He might also consider the benefits too low, since there is some doubt that the costs of warranty administration are reflected accurately in the purchase price of cars. See note 133 *supra*.

have a simplified warranty that covered all malfunctions, no matter how caused, within, perhaps, certain time and mileage limitations.¹⁴² Although I lack any measure for the costs and benefits of categorization, I regard this argument as suspect if based solely on enterprise liability theory. Even under a simplified warranty it would still be necessary to retain a decisionmaking system for determining whether a malfunction exists and how it can be repaired. Most of the problems in warranty administration today derive from mistakes in these decisions. Moreover, the manufacturers would still justifiably insist on establishing some administrative controls to insure that reimbursement claims from dealers related to repairs that were in fact made and needed. Therefore, there would still be extensive administrative costs under a simplified warranty.

A simplified warranty lacking most of the current limitations on coverage might be supported by various substantive norms other than enterprise liability theory, however. It would better achieve the goal of compensation, which is emphasized in the current reforms in tort law and underlies much of loss spreading theory. An expensive repair can cause economic dislocation to an owner whether or not caused by the manner in which he operates the vehicle. A simplified warranty would also offer the manufacturers greater incentive to design more durable automobiles that will withstand many uses now considered abuses as a means of lessening warranty costs. This could permit greater flexibility in the use of new cars and perhaps reduce the number of accidents resulting from malfunctions. Notice received norms may also support a simplified warranty, since with fewer limitations on the warranty many owners may understand those that remain better.

The automobile warranty also raises some possible antitrust issues. By being a compulsory part of the sales contract, the warranty effectively ties the purchase of a certain amount of auto repair work to the purchase of a new car. The principles to be applied to tying contracts under the Clayton and Sherman Acts are hardly clear, nor is the application of the different possibilities simple, and

¹⁴² This is similar to the argument often made in support of automobile compensation plans. It is claimed that the cost of administering the present fault system vastly exceeds whatever benefits could be possibly gained from the system. A. CONARD, J. MORGAN, R. PRATT, C. VOLTZ & R. BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION* (1964). It is also argued that the fault concept is so vague that it fails to distinguish properly those cases in which the costs of an automobile accident should be attributed to the activity of operating an automobile from the cases in which they should be attributed to the manner in which the vehicle was operated, with a resulting misallocation of costs. See the articles by Calabresi cited in note 131 *supra*. For a criticism of the application of enterprise liability theory to automobile accidents, but not of the theory itself, see Blum & Kalven, *The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence*, *supra* note 131.

it would take an article in itself to explore fully the implication of the antitrust laws for the automobile warranty.¹⁴³ I shall limit myself here merely to suggesting some of the issues that might be raised.

The very existence of the warranty might be attacked as an impermissible tying arrangement. Recent cases have made it quite clear that if there is dominance in the tying market and an appreciable restraint of competition in the tied market, a tying arrangement is highly suspect and maybe per se illegal. It may even be that a showing of appreciable restraint of competition in the tied market is enough to establish invalidity.¹⁴⁴ All three major manufacturers probably qualify as being dominant in the tying market, and certainly General Motors does.¹⁴⁵ Moreover, it is likely there has been an appreciable lessening of competition in the tied market, the automobile repair business. I do not have precise figures on this point, but a representative of one manufacturer told me that he expected 25 percent of a dealer's service business to be warranty work under the expanded five year warranty introduced in 1967. The percentage of the total automobile repair business (probably the relevant market)¹⁴⁶ now consisting of warranty work would be considerably less, but it is certainly not insignificant. Even if a substantial lessening of competition can be shown, the manufacturers may be able to argue, although the cases suggest that the relevance of this argument is more doubtful,¹⁴⁷ that the

¹⁴³ Since the warranty involves the sale of both goods (i.e., replacement parts) and services, both the Clayton Act (which applies just to tied goods) and the Sherman Act may be applicable. For general discussions of the applicability of the antitrust laws to tying contracts see Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50 (1958); A. NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* 154-59, 185-215 (1960).

¹⁴⁴ See *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *Standard Oil Co. v. United States*, 337 U.S. 293 (1949). See also Comanor, *Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath*, 81 HARV. L. REV. 1419, 1429-30 (1968); the author appears to suggest that arrangements tying services to the sale of goods should be suspect regardless of the size of the market affected because the arrangement is likely to lead to the provision of more services than would be provided if they were sold separately and at a joint price exceeding the sum of the prices that would be set if the goods and services were priced separately.

¹⁴⁵ See Ferguson, *Tying Arrangements and Reciprocity: An Economic Analysis*, 30 LAW & CONTEMP. PROB. 552, 565 (1965), where it is suggested that if a seller controls 15% of the tying market, his tying contracts should be considered per se illegal.

¹⁴⁶ It could be argued, I suppose, that the relevant market is repair work on new cars. In calculating the percentage of the relevant market accounted for by warranty work, it might be desirable to take account of the amount of nonwarranty repair work that dealers are able to sell owners when they return to the dealer's service shop to have warranty work performed. See note 40 *supra*.

¹⁴⁷ See authorities cited in note 144 *supra*. Recently, several commen-

warranty can be sustained because it fulfills legitimate needs. The most important among these needs are probably those supported by enterprise liability theory—namely, the spreading of inevitable losses resulting from automobile manufacturing among all those who benefit.¹⁴⁸ Even if the basic concept of the warranty could be supported on this theory, it is questionable whether the warranty period need be so long.¹⁴⁹ As I have discussed previously, the needs identified by enterprise liability theory might be adequately served by a one or two year warranty, and, of course, the shorter the warranty period, the less the anticompetitive effects.

Another provision of the warranty that might be challenged by the antitrust laws is the requirement that an owner return his car to an authorized dealer for warranty repair. Much of the anticompetitive effect of the warranty would be eliminated if the manufacturers would authorize any qualified automobile repair business to perform warranty work for which they would be reimbursed, or if the manufacturers would reimburse owners for the amounts they paid for warranty work performed by other than an authorized dealer.¹⁵⁰ The manufacturers would argue, perhaps successfully, that all sorts of legitimate needs are served by the requirement that warranty work be performed at authorized dealers. The determination whether a particular repair should be made under warranty is quite complex, frequently requiring an examination of the malfunction. The manufacturers might contend that these determinations should be made by persons in whom they

tators have argued vigorously that a rule of reason approach should be applied to tying contracts. Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957); Markovits, *Tie-ins, Reciprocity, and the Leverage Theory*, 76 YALE L.J. 1397 (1957). The recent case of *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961), might be read to lend support to this argument. But cf. Comanor, *supra* note 144, at 1437-38.

¹⁴⁸ Another argument might be that the manufacturers need to tie repair work to the sale of the car in order to protect its reputation as a producer of roadworthy automobiles. See note 151 *infra* and accompanying text.

¹⁴⁹ In *United States v. American Can Co.*, 87 F. Supp. 18 (N.D. Cal. 1949), the court found a legitimate reason to support an otherwise anticompetitive practice of selling tin cans only through requirements contracts, but held that the requirements contracts need not be as long as they were and directed that the time period be shortened. There may well be an analogy to the automobile warranty.

¹⁵⁰ Any such program would undoubtedly increase the costs of warranty administration, however. This would certainly be the case if the manufacturers chose to reimburse owners for warranty work performed by nondealers, since commercial repair rates generally exceed warranty reimbursement rates. See note 39 *supra* and accompanying text. If the manufacturers were to authorize nondealers to perform warranty work and apply for reimbursement directly, they would probably have to increase reimbursement rates in order to attract enough nondealer repair businesses to the program to avoid the possible antitrust consequences discussed in the text.

have trust and over whom they have some control—the dealers. Devices controlling warranty repair determinations such as making certain repairs subject to the manufacturer's prior approval might be impossible to administer if anybody other than an authorized dealer were involved. Perhaps most importantly, the manufacturers could argue that performance of quality warranty work is essential to their good will and reputation as producers of quality automobiles and consequently that they have a right to insist that it be performed by persons they trust.¹⁵¹

The manner in which the maintenance conditions are administered might also be attacked under the antitrust laws. It would quite probably be a violation of the antitrust laws for the manufacturers to provide that owners must have the required maintenance services performed at an authorized dealer. There would be no legitimate need to which the manufacturers could point to justify this tying of maintenance services to the sale of a new car with warranty. Although the manufacturers do not impose such a requirement, perhaps out of a fear of the antitrust consequences, over 50 percent of the owners in my survey believed that the maintenance services must be performed at such places.¹⁵² The probable reason this belief is so widespread is that the dealers and manufacturers, in explaining the warranty provisions to owners, place great stress on the desirability of having maintenance services performed at an authorized dealer, and in their enthusiasm they may induce many owners to construe urgings as commands. If so, it would be proper under the antitrust laws to require the dealers and manufacturers to give notice more clearly to owners about rights in this regard. If there is still a great deal of misunderstanding, perhaps it would be appropriate to require abandonment of the maintenance and certification conditions altogether.

V. REGULATING WARRANTY ADMINISTRATION

It is evident that commentators can find much to criticize in the current patterns of warranty dispute settlement. Most persons

¹⁵¹ In *Pick Manufacturing Co. v. General Motors Corp.*, 298 U.S. 648 (1935), the Supreme Court sustained against attack under the antitrust laws General Motors' requirement that its dealers use only manufacturer approved parts in repairing cars produced by General Motors. The reason given by the Court was that the use of quality parts in repairs was important to the protection of General Motors' good will, since owners receiving ineffective repairs would tend to place the blame for the consequent faulty operation of their vehicles on the manufacturer. The *Pick* case is over 30 years old and therefore not a completely reliable precedent, but the analogy between it and the warranty situation is clear. See also *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

¹⁵² See note 120 *supra* and accompanying text. A representative of one manufacturer indicated to me that in its case, at least, it was fear of antitrust consequences that led it not to require maintenance services to be performed at authorized dealers.

would probably agree, moreover, that at least some of the problems are sufficiently pressing to justify consideration of warranty administration. In considering the possibilities for additional regulation, however, it is necessary to keep in mind that regulation may introduce more new problems than it solves.

There are at least three broad approaches that can be taken to problems of consumer protection. One approach consists of direct regulation of the processes for manufacturing consumer goods in an effort to improve the quality of the goods offered for sale. The automobile safety legislation and food and drug inspection are examples of this type of regulation.¹⁵³ Another approach focuses on the settlement of disputes between sellers and consumers and attempts to increase the effectiveness of dispute settling institutions in ferreting out individual abuses of consumers. For example, the neighborhood legal offices established by the Office of Economic Opportunity are designed in part to encourage greater resort to the courts by poor consumers having grievances against retailers. A third approach does not focus directly on individual dispute settlements but attempts to affect them by regulating the factors that influence the content of both formal and informal dispute settlement. For example, in several areas legislation has been enacted prescribing or proscribing the inclusion of certain terms in various consumer contracts, with the expectation that the contract terms will exert an important influence over dispute settlement.¹⁵⁴ Notice regulation often falls in this category, since one of its principal purposes is to enable consumers to exert some influence over the formulation of the terms of standardized form contracts.

The various proposals for regulating the automobile warranty that have been made in recent months have encompassed all these approaches. Consequently discussion of the relative effectiveness of different ways of regulating the warranty is best made through analysis of these proposals. The most significant regulatory proposals are contained in two bills presently before Congress. One bill applies to warranties and guarantees on all types of consumer products and provides principally for regulation of manufacturers' notice giving practices.¹⁵⁵ The other bill applies just to automobile warranties and provides for a number of different regulatory approaches.¹⁵⁶ Probably the most important provisions of this second bill regulate the terms of the manufacturers' warranty given to the

¹⁵³ 15 U.S.C. §§ 1381-1409 (Supp. III 1965-1967); 21 U.S.C. (1964) *passim*.

¹⁵⁴ Insurance law is an area in which this regulatory approach is often taken. See note 1 *supra*.

¹⁵⁵ S. 2726, 90th Cong., 1st Sess. (1967). This bill was introduced by Senators Hayden and Magnuson and has been referred to the Senate Committee on Commerce. For a discussion of its principal provisions, see note 190 *infra*.

¹⁵⁶ S. 2727, 90th Cong., 1st Sess. (1967). This bill was also introduced by Senators Hayden and Magnuson.

original owner¹⁵⁷ and of the franchise contracts between the manufacturers and dealers.¹⁵⁸ These detailed terms, called "standards," are to be prescribed by the Secretary of Commerce, but the bill itself lists many that must be included in the secretary's prescriptions. Among the required warranty terms is one that promises that the vehicle is free from defects at delivery, apparently without regard to the time or mileage at which the defect manifests itself, and possibly without regard to the maintenance and certification conditions.¹⁵⁹ Another provision states that any defect made the subject of an owner claim for a repair within 12 months of delivery, regardless of mileage, "shall be presumed in the absence of substantive proof to the contrary to have existed [at delivery] . . .," thereby certainly prohibiting the application of maintenance and certification conditions during these first 12 months.¹⁶⁰ The manufacturers are also required to promise reimbursement for warranty repairs obtained from other than an authorized dealer if the repairs are required for safety or to render the vehicle operable and if it is not feasible to return the vehicle to an authorized dealer, or if no dealer "in the immediate vicinity of the place at which . . . service is required . . . is able to provide . . . service within a reasonable period of time . . ."¹⁶¹ The bill also prohibits a number of conditions and limitations on warranty coverage, including the disclaimer clause.¹⁶² The requirements for the franchise con-

¹⁵⁷ *Id.* § 4.

¹⁵⁸ *Id.* § 8.

¹⁵⁹ *Id.* § 4(a)(3)(A). This section provides that the warranty must include provisions by which "such motor vehicle is warranted to be free from damage and defects at the time of delivery of possession thereof to the first purchaser thereof." The term "defect" is defined very broadly in section 11 (13) and in particular it includes "any failure of such motor vehicle or any component thereof to conform to standards or specifications therefor adopted by the manufacturer thereof." Doubt about whether the draftsmen intended these sections to be read as broadly as I suggest in the text they could be arises from section 4(a)(5), which requires the manufacturers to "specify with particularity the nature, extent, duration, conditions, and exceptions of any additional warranty . . ." If the first sections mentioned in this footnote are read as broadly as I suggest they could be, there would hardly be need for any "additional warranty."

It should be noted that the sections being discussed here also appear to prohibit the restrictions on warranty coverage for second and subsequent owners of a vehicle that were introduced by the manufacturers in the 1968 model year. See note 15 *supra*.

¹⁶⁰ *Id.* § 4(a)(3)(B). It should be noted that this provision apparently applies during the first 12 months without regard to the vehicle's mileage.

¹⁶¹ *Id.* § 4(a)(4).

¹⁶² *Id.* §§ 4(b)(4),(5). As presently drafted, these sections would prevent the manufacturers from disclaiming any liability arising under state laws pertaining to implied warranties of merchantability and fitness for a particular purpose. The effect may be to provide owners experiencing malfunctions caused by manufacturing defects with a remedy of rescission and return of the purchase price in addition to the ordinary remedy of repair or replacement of the defective parts. I have argued

tract are at least as radical. The most important changes concern reimbursement of the dealer for warranty work. The contract must include provisions requiring the manufacturer to reimburse the dealer for all those repairs now considered to be dealer responsibility,¹⁶³ as well as for all of the pre-delivery inspection and conditioning.¹⁶⁴ The rate of reimbursement, for both parts and labor, must be "equal to the aggregate amount which [a] dealer would receive for like service rendered to retail customers . . ."¹⁶⁵ and the manufacturer must also reimburse the dealer for his expenses in handling the paperwork connected with warranty administration.¹⁶⁶

Although the warranty and franchise standards are probably the most important provisions, the bill includes a number of other approaches to warranty regulation. The Secretary of Commerce is directed to prescribe rules for the arbitration of claims by owners and dealers against the manufacturers.¹⁶⁷ In the case of owner claims, the rules must include provision for "the inspection and evaluation of any motor vehicle as to which such claim is made by an impartial motor vehicle analysis or diagnosis organization . . ."¹⁶⁸ A successful owner or dealer claimant is entitled to reimbursement of all expenses reasonably incurred in the assertion of the claim¹⁶⁹ and any arbitration award may be filed in a federal court and enforced like other arbitration awards.¹⁷⁰ The Secretary of Commerce is also required to appoint representatives who will evaluate the quality control measures of all plants manufacturing or assembling motor vehicles or components for motor vehicles by making unannounced inspections at least once a year. The representatives' report is to include recommendations for improvement of quality control measures and the recommendations, which are not binding,

elsewhere that this may not be desirable. Whitford, *supra* note 80, at 154-60.

The bill would also prohibit the manufacturer from excluding tires or other component parts from the coverage of the warranty, as is presently done. S. 2727, 90th Cong., 1st Sess. §§ 4(b)(2), (3) (1967).

¹⁶³ S. 2727, 90th Cong., 1st Sess. § 6(a)(3) (1967).

¹⁶⁴ *Id.* § 6(a)(4).

¹⁶⁵ *Id.* § 6(a)(4)(B). Section 6(a)(4)(A) requires that this payment be made no more than 2 months after the dealer files a written claim for reimbursement.

¹⁶⁶ *Id.* § 6(a)(5). Other provisions would require the manufacturer to promise the dealer that parts for use in warranty repairs will be promptly supplied and that diagnostic assistance will be available without cost to the dealer. *Id.* §§ 6(a)(6) and (7).

¹⁶⁷ *Id.* §§ 5, 7.

¹⁶⁸ *Id.* § 5(a).

¹⁶⁹ *Id.* §§ 5(a), 7(a).

¹⁷⁰ The enforcement of the arbitration award would be in accordance with the provisions of title 9 of the U.S. Code. An owner or dealer who successfully sues a manufacturer in federal court for enforcement of an arbitration award is entitled to recovery of all costs, including attorney's fees, and in some circumstances an indemnity of between \$100 and \$1000. S. 2727, 90th Cong., 1st Sess. §§ 5(b), 7(b) (1967).

are to be transmitted to the manufacturers.¹⁷¹ Finally, the manufacturers are required to keep detailed records about warranty administration and to submit an annual report to the Secretary of Commerce which will be made public. The reports would include, *inter alia*, statistics about the number of warranty claims pertaining to the different types of malfunctions and the number of unsettled warranty claims at the end of each year. On the basis of these reports, the Secretary of Commerce is to make an annual report to Congress evaluating the effect of the bill and recommending additional legislation if necessary.¹⁷²

There have been several other proposals for regulation of the warranty. For the past two years the Federal Trade Commission has been conducting a survey of automobile warranty practices.¹⁷³ It is not known whether anything will ever be made public about the survey's results, nor is it known what types of regulation the commission may be considering.^{173a} In the past the commission has concerned itself with the content of the manufacturers' warranty advertisements and presumably notice giving practices are again one of its concerns.¹⁷⁴ At least two states have actually initiated regulation of warranty practices. In both instances the regulation consists of a requirement that the manufacturers reimburse the dealers for warranty work at retail labor rates, and it is enforced by the administrative body already charged with licensing manufacturers and dealers engaged in the motor vehicle business in the respective states.¹⁷⁵

¹⁷¹ S. 2727, 90th Cong., 1st Sess. § 2 (1967). This section contains provisions providing access to relevant documentary information by the secretary's representatives, but the information must be treated as confidential to prevent the release of trade secrets to competitors.

¹⁷² *Id.* § 8.

¹⁷³ See N.Y. Times, Dec. 12, 1966, at 4, col. 5 (city ed.).

^{173a} Just as this article was being sent to the printer, the FTC made public its study and announced plans for public hearings beginning January 9, 1969. The five major recommendations are: (1) better assembly-line inspection and testing by manufacturers and pre-delivery inspection by dealers; (2) more adequate reimbursement for warranty repair work; (3) more careful inspection of dealer repair shops; (4) simpler warranties; (5) greater publicity given to the warranty provisions. Wall Street Journal, Nov. 18, 1968, at 2, cols. 3-4.

¹⁷⁴ If the proposed congressional legislation is enacted, it is possible the FTC will take no further action. The detailed knowledge of the workings of the warranty administration process reflected in the proposed legislation suggests that the FTC may have participated in the drafting of the legislation.

¹⁷⁵ The two states are Louisiana and Tennessee. AUTOMOTIVE NEWS, May 20, 1968, at 3, col. 3; *Id.* May 13, 1968, at 1, col. 3. The Tennessee law has drawn the most marked response by the manufacturers: they have all filed suit in federal court to have it declared unconstitutional, and the state has agreed not to enforce the law until a final judgment has been rendered. The arguments raised are several, including unreasonable interference with interstate commerce and violation of the fourteenth amendment's due process clause. The latter argument is based in part on the

A. *Regulating Manufacturing Procedures*

The complete solution to problems of warranty administration is to construct new cars that uniformly contain no manufacturing defects. Obviously, this is impossible. Nevertheless, critics of the automobile manufacturers have maintained that there are many measures the manufacturers can take to reduce the number of manufacturing defects.¹⁷⁶ The drafters of the proposed legislation apparently believe these claims are sufficiently plausible to merit some effort to increase the effectiveness of quality control. The bill does not propose federal inspection of the products themselves, as is presently done for many other products about the quality of which the federal government has expressed concern,¹⁷⁷ probably out of respect for the magnitude of the task of establishing inspection systems for the hundreds of parts that make up a motor vehicle. Nor does the bill vest authority in an administrator to require the manufacturers to make changes in their own quality control systems. Although this type of regulation would have been more feasible, it would involve the danger that the administrator, due to a lack of sufficient knowledge of the intricacies of the production processes for each of the parts included in a motor vehicle, would enter an order that would be quite disruptive to those processes. Perhaps for these reasons, the bill settles on nonbinding recommendations, based on random inspecting of the manufacturers' quality control measures, that apparently are intended to act as catalysts to the manufacturers' own efforts to improve quality control.¹⁷⁸ It cannot be determined now whether the bill's provisions will have that effect, or whether improved quality control will substantially reduce the incidence of manufacturing defects, but it seems unlikely that the number of manufacturing defects will be so re-

fact that the Tennessee Motor Vehicle Commission, which is charged with administering the new law, is composed almost entirely of automobile dealers. *Id.*; AUTOMOTIVE NEWS, May 20, 1968, at 2, col. 5. The Tennessee law not only requires the manufacturers to reimburse the dealers at retail rates, but also to reimburse dealers for diagnostic time and to pay or reject reimbursement claims within 60 days after receiving them. The dealers are required to perform all types of warranty work for visiting owners with a car sold by a dealer representing the same manufacturer. AUTOMOTIVE NEWS, May 6, 1968, at 14, col. 5.

¹⁷⁶ Some description of the manufacturers' quality control procedures is contained in Wall Street Journal, July 24, 1967, at 1, col. 6; Wall Street Journal, July 21, 1965, at 1, col. 6. For criticism of these procedures, see *id.*; CONSUMER BULLETIN, Feb., 1966, at 43; 1965 CONSUMERS REPORTS 173 (April issue).

¹⁷⁷ This type of regulation is often imposed on the manufacturers of foods and drugs. See generally 21 U.S.C. (1964) *passim*.

¹⁷⁸ To assist the catalytic effort, the bill provides that within two to six months after transmission of recommendations for improvement of the quality control measures to any manufacturer, the Secretary of Commerce shall cause any facility named in the recommendations to be reinspected without advance notice for a further evaluation of the quality control measures. S. 2727, 90th Cong., 1st Sess. § 2(c) (1967).

duced as to render consideration of other approaches to regulating warranty administration irrelevant.

B. Adjusting Individual Grievances

One of the more original approaches to consumer protection proposed in the federal legislation establishes an arbitration system for adjudication of claims by owners that they have been denied their rights under the warranty. The obvious purpose of this provision is to increase the effectiveness of the legal process in intervening directly to correct a denial of warranty rights. Making direct intervention of this type more effective can also indirectly regulate the manufacturers' practices in administering the warranty by inducing the manufacturers to adopt practices that will reduce the number of disputes in which the owner might receive a favorable arbitration award. The effectiveness of any plan for regulating warranty administration in these manners depends on a substantial number of owners resorting to the dispute settling mechanisms. Yet very little is known about what induces owners to use them. The drafters of the proposed arbitration scheme obviously believe, however, and probably correctly, that too few automobile owners will ever resort to courts to rely on them to be effective adjusters of individual warranty grievances. None of the reforms that have been or are being tried to make courts more effective protectors of consumers in other areas are likely to have significant impact on warranty administration. Attempts are currently underway to effectuate reform in some types of consumer transactions—especially transactions involving the poor—by providing consumers with free legal assistance so that resort to the courts will not be so burdensome. New car owners are fairly wealthy and educated,¹⁷⁹ however, and in most instances their failure to resort to lawyers and courts should be attributed not to lack of resources but primarily to the fact that, because of the difficulties of proving the existence of a manufacturing defect, the litigation costs often exceed the possible recovery. Consequently, the cost of a program of providing free legal services to automobile owners would be substantial. An alternative measure, involving little or no expenditure by the state, would be to charge the litigation costs of a successful owner to the manufacturer.¹⁸⁰ Even then, however, an

¹⁷⁹ According to one survey, the median household income of new car buyers was \$10,990, and the average household income was \$14,621. Only seven percent of the buyers had a household income less than \$5,000. MARKET RESEARCH DIV., ADVERTISING DEP'T, U.S. NEWS & WORLD REP., *THE BUYERS OF NEW AUTOMOBILES 1962-66*, at 10-11 (1966). My own survey yielded similar results. Less than nine percent of my respondents indicated their household income was less than \$5,000. The median household income was between \$9,000 and \$10,000.

¹⁸⁰ The UNIFORM DECEPTIVE TRADE PRACTICES ACT § 3(b) (1964), allows the prevailing party to a court action to recover his attorney fees in certain circumstances. See Dole, *Merchant and Consumer Protection: The*

owner contemplating suit would be faced first with the risk that he would lose and have to absorb his litigation expenses and second with the inconveniences of hiring a lawyer and waiting out the usual lengthy delay before judgment. In an effort to overcome these barriers to the judicial process, many states have established courts with simplified procedures that encourage people to appear without a lawyer—for example, small claims courts. For reasons that are not entirely clear, consumers have not on the whole made much use of these courts.¹⁸¹ They are even less likely to make use of them in automobile warranty disputes because of the usual necessity of employing an expert witness to establish the existence of a manufacturing defect. Perhaps the most important reason that courts can never be effective regulators of warranty administration, however, is that courts are designed to deal with complete denials of rights under contracts. Many of the major criticisms of warranty administration regard difficulties that can often be overcome if the owner is persistent. For example, a visiting owner can usually obtain a warranty repair if he bothers to return to his selling dealer; an owner who receives an inadequate repair can probably obtain satisfaction if he goes to the trouble of returning his car to the dealer repeatedly.¹⁸² The very factors that discourage such owners from pursuing their remedies in the informal process are likely also to discourage their resort to courts.

The arbitration system proposed by the bill may avoid many of the difficulties that prevent courts from becoming effective regulators of warranty administration. Proceedings will probably be quicker, less formal, and less costly, and consequently owners may be more willing to resort to arbitration. Most important is the bill's requirement that the arbitration system provide for inspection of any automobile by an impartial expert. Assuming the inspection procedures are institutionalized with experts given blanket authorization to perform arbitration inspections in a given area, an owner should be able to establish the existence of a manufacturing defect conveniently and at little cost. The bill does not indi-

Uniform Deceptive Trade Practices Act, 76 YALE L.J. 485 (1967).

A companion bill to the proposed bills affecting warranty administration that are discussed in the text would regulate warranties issued in connection with the sale of household appliances. The bill proposes an arbitration system similar in structure and purpose to the proposed system for arbitrating warranty claims. It would require, however, that the appliance manufacturers pay all the expenses incident to arbitration of a claim, although the manufacturer could obtain reimbursement from the claimant if the arbitrator determines that the "claim was asserted in bad faith and . . . was wholly without merit." S. 2728, 90th Cong., 1st Sess. § 4(b) (1967).

¹⁸¹ See Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 436-38 (1966); Rapson, *The Dane County Small Claims Court*, 1961, at 36 (unpublished thesis in University of Wisconsin Library).

¹⁸² See note 87 *supra* and accompanying text.

cate to what extent an owner will be required to exhaust his remedies before the manufacturer before resorting to arbitration,¹⁸³ but it is entirely possible that an owner will be allowed to turn to the arbitration system for a diagnosis of the defect and an order that it be repaired after only one unsuccessful effort at obtaining a warranty repair from a dealer. This would provide a relatively effective remedy against delay. Nevertheless, there is some reason to doubt that owners will make as much use of the arbitration device as might be desirable. There already exist a number of institutions for adjusting consumer grievances that owners could approach informally and cheaply. In Wisconsin, for example, there is the Better Business Bureau of Greater Milwaukee and the Motor Vehicle Department that are sometimes willing to intervene in particular disputes.¹⁸⁴ Although these institutions lack the formal power to arbitrate disputes and generally restrict their efforts to mediation, they are potentially very effective. We have seen that letters of complaint sent to the manufacturer by the owner often lead to a reevaluation of the initial denial of an owner's claim. Officials of an institution specializing in consumer complaints should know better than most owners when and to whom an inquiry or complaint would be most effective. Despite the potential effectiveness of these mediating institutions, however, disappointed warranty claimants have rarely used them. The proposed arbitration system will be able to examine the vehicle and to enter binding awards and these features may encourage some owners to turn to it who would not otherwise use a mediating institution. Moreover, an arbitrator will presumably have the power to direct the manufacturers to make a warranty repair even though their interpretation of the warranty indicates that the owner is not entitled to one. Mediators can usually only assure that the manufacturers correctly apply their own interpretations and, therefore, can offer no assistance to some owners. On the other hand, because an arbitration enters a binding award, there will be pressures to adopt more formal procedures, perhaps including a hearing, than a mediating institution uses,¹⁸⁵ and this formality may scare off many owners.

¹⁸³ The bill directs the Secretary of Commerce, after consultation with the FTC, to promulgate rules governing the arbitration system, and these rules may cover the question of exhaustion of remedies.

¹⁸⁴ See notes 45-48 *supra* and accompanying text. For a description of a New York State institution performing a similar function, see Mindell, *The New York Bureau of Consumer Frauds and Protection—A Review of its Consumer Protection Activities*, 11 N.Y.L.F. 604 (1965). Professor Gellhorn has recently argued at great length, and with considerable persuasiveness, that there is a need for an independent mediating-type institution (i.e., an ombudsman) to adjust grievances between citizen and government. W. GELLHORN, *WHEN AMERICANS COMPLAIN* (1966). The institutions being discussed in the text are in a sense the counterpart institutions for the private sector.

¹⁸⁵ It might be possible to challenge the constitutionality of the proposed

The difficulty in evaluating the effectiveness of the proposed arbitration system is that it is a largely unprecedented approach to consumer protection. Largely because it is unprecedented, it is desirable that it be tried, at least experimentally. Other than requiring the formal warranty to provide for arbitration of warranty disputes in accordance with the proposed system,¹⁸⁶ the bill does not provide any means for publicizing the availability of arbitration to consumers. It is clear, however, that publicity will be a prerequisite to attaining the necessary degree of owner aggressiveness. One possibly effective way to provide the necessary publicity would be to require the manufacturers to describe the workings and functions of the arbitration system in the owner's manual.

The unprecedented nature of the proposed arbitration system makes it inadvisable, however, to rely solely on arbitration as a means of adjusting individual warranty grievances. It should be possible to supplement an arbitration system with other dispute settling institutions that may be more likely to attract the complaint of many owners. For example, an attempt might be made to increase the number of owners resorting to existing mediating institutions in view of the informality of the procedures for approaching these institutions. Letters of complaint to the manufacturer are already a fairly effective means of adjusting individual grievances and efforts might profitably be made to increase the use made of this avenue of relief. The manufacturers' procedures for responding to these letters are such that frequently a second examination of the complainant's vehicle is made by a representative of the manufacturer. This examination serves many of the same functions as a check against arbitrary action as would the inspection procedures under the proposed arbitration scheme. Moreover, to many owners a letter to the manufacturer may seem like an easier, cheaper and less drastic response to a denial of a warranty repair.

arbitration system as a denial of the right to jury trial. It has generally been held that statutes compelling arbitration of civil disputes without the prior agreement of the parties or upon application of only one of the parties constitute unconstitutional denials of jury trial unless the statute provides for a de novo appeal to a court from the arbitrator. Annot., *Constitutionality of Arbitration Statutes*, 55 A.L.R.2d 432-52 (1957). The draftsmen of the proposed federal legislation have apparently tried to avoid these decisions by providing that the manufacturers must include a term in their warranties allowing an owner, at his option, to demand arbitration of a warranty claim in accordance with the arbitration system that would be established by the bill. S. 2727, 90th Cong., 1st Sess. § 4(a) (8) (1967). Compulsory enforcement of prior agreements to arbitrate disputes has long been considered constitutional, of course. Nevertheless, it might be argued that the bill's device of compelling the manufacturers to agree to arbitration is just a round-about way of denying them their right to jury trial. It should be noted that the bill would force only the manufacturers to submit to arbitration unwillingly: the right to sue in court on a warranty claim is carefully preserved as an alternative avenue to redress available to an owner. *Id.* § 5(c).

¹⁸⁶ S. 2727, 90th Cong., 1st Sess. § 4(a) (8) (1967).

Both mediating institutions and letters of complaint would be more effective means of correcting improper denials of warranty rights if owners are made to appreciate better the utility of these avenues of relief. Again, the owner's manual would seem to be one effective medium for conveying the necessary information.

C. Direct Regulation of Practice

Although much improvement may be made in the mechanisms for ferreting out and correcting individual abuses, it is doubtful that enough automobile owners will be induced to refer their grievances to dispute settling mechanisms to permit this type of regulation to meet all the objections that could be raised about warranty administration. Moreover, many of the possible criticisms about the content of the formal warranty could not possibly be raised in the type of adjudicative regulations I have been discussing.¹⁸⁷ Perhaps for these reasons various proposals have been made for direct governmental regulation of the manufacturers' rules and practices. Such regulation potentially consists of statutes, administrative orders, or possibly even court injunctions, requiring the manufacturers to alter various rules and practices, such as the amount of notice given in the owner's manual, the maintenance and certification conditions, or the rate of reimbursement allowed to dealers on warranty repairs. There are dangers in regulating at this level. Any governmental regulation of the warranty to some extent interferes with the manufacturers' freedom and second guesses their expertise in determining what is the best way to administer the warranty. Even adjudication of individual cases to determine only whether the manufacturers have correctly applied their own rules has this effect, because the manufacturers and dealers are the most knowledgeable about the meaning of their rules and have the best access to the facts to which the rules are to be applied. The dangers of interfering with the manufacturers' expertise are much greater, however, in governmental change of those rules or of the manufacturers' administrative practices, since a mistake will

¹⁸⁷ It is possible, of course, for an adjudicative body to require changes in the content of the formal warranty in the course of an adjudication. Thus, a court could declare the maintenance and certification conditions unenforceable. In my categorization, however, this would be direct regulation of practices, although imposed by a court and not by a statute or administrative order. The various proposed institutions for correcting individual grievances that I have just discussed are clearly designed principally to insure that the rules of the formal warranty are accurately applied in practice. Indeed, in view of the extensive powers given to the Secretary of Commerce in the proposed federal legislation to prescribe the content of the formal warranty, it can be doubted whether the arbitration system set up by that legislation would have any power to declare a warranty limitation unenforceable. That power may be vested entirely in the Secretary of Commerce.

necessarily affect very many cases.¹⁸⁸ It is advisable, therefore, to consider whether the criticisms of present day warranty administration are of sufficient importance to risk the dangers of direct regulation of practices. Certainly our experience in direct regulation of other activities, such as commercial aviation or natural gas production, illustrates the great risks of unnecessary private regulation of business. We cannot determine certainly whether these risks outweigh the potential advantages of direct regulation of automobile warranties, but the question is not any less important for that reason.

If the decision is made to go ahead with direct regulation, the question becomes which rules and practices should be regulated. Many persons, for reasons similar to those which cause them to evaluate consumer transactions only in terms of notice, would favor direct regulation only of the manufacturers' and dealers' practices with regard to notice, while others may be willing to go further and regulate the content of the rules and practices as well. Because of the risks of direct regulation, probably most people would favor limiting the regulation to notice practices if such action would correct all the criticisms of present warranty administration.

1. REGULATING PRACTICES REGARDING NOTICE

Practices with regard to notice can be regulated with a view towards notice giving, notice received, or both. Courts and commentators espousing norms emphasizing notice as a means of policing standardized form contracts have not often indicated whether they are discussing notice given or notice received, although my impression is that they are usually referring to notice given. The proposed federal legislation providing for extensive notice regulation of all types of warranties and guarantees is also principally concerned with notice giving regulation, as are the existing forms of notice regulation.¹⁸⁹ Whether notice given or notice received should be emphasized depends, in the abstract, upon one's policy biases. Notice received would be emphasized by a person primarily concerned with preserving the buyer's freedom not to enter into contracts he considers too unfavorable or his ability to make alternative arrangements to reduce the risks imposed on him by the contract. Because it is not entirely within the manufacturers' control whether a purchaser, or even a majority of purchasers, receive notice, a person more concerned with preserving the manufacturers' freedom to determine the provisions of a standardized con-

¹⁸⁸ There are, of course, a number of disadvantages to direct regulation. There are discussions of the advantages and disadvantages of administrative regulation of business in most casebooks on administrative law. *E.g.*, W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW* 1-21 (1960).

¹⁸⁹ Existing regulation consists mostly of the FTC's regulation of advertising. See note 100 *supra* and accompanying text.

tract so that they can rationally organize their bureaucracy would require only notice given. More concretely, however, if there is insufficient notice giving about a particular warranty provision, it would be consistent with the positions of all persons advocating notice norms to require increased notice giving by the manufacturers no matter how much notice is received. Assuming less than 100 percent of owners receive notice, further notice giving may contribute to a greater degree of notice received, and certainly advocates of a notice received norm, who have less respect for the manufacturers' freedom to structure their own bureaucracy, cannot object to a requirement of greater notice giving.

Although the proposed federal legislation providing for notice regulation is concerned mostly with the content of notice giving, the information it requires is no more specific about a purchaser's rights than the information already given by the automobile manufacturers in the formal warranty and owner's manual.¹⁹⁰ As my earlier discussion evaluating the manufacturers' notice giving practices indicates, I think the content of the manufacturers' notice given might be improved in several respects.¹⁹¹ Perhaps the greatest need is for more notice about the specialized rules for administering the misuse and normal deterioration limitations, particularly since there is some evidence that many owners receive notice only in terms of these specific, concrete rules.

There may be need to regulate the timing of notice giving in order to ensure that more information about the warranty be made available to owners before the signing of the sales contract.¹⁹² The proposed federal legislation providing for notice regulation, as applied to automobiles, would largely meet this need by requiring the manufacturers to attach at least a reproduction of the formal warranty to each new car, where it could be inspected by prospective purchasers.¹⁹³ Although the proposed legislation would not require further notice giving, in the case of automobiles I think it would be wise if notice giving before purchase was not considered sufficient to replace the explanations currently contained in the owner's manual. Many of the purposes for requiring notice—for

¹⁹⁰ As applied to automobile warranties the bill would require the warranty to state the name and address of the manufacturer and that dealers are authorized to carry out the warranty. It would also be required to include a "detailed statement" of the parts and type of defects covered by the warranty, its length, the different owners covered by the warranty, the maintenance conditions, and the parts and types of damage not covered by the warranty. S. 2726, 90th Cong., 1st Sess. § 103(a) (1967). In addition, section 104 (a) directs the FTC to develop an abbreviated description of the type of warranty issued by the automobile manufacturers, which description, together with the length of the warranty, would appear as the title in every publication of the formal warranty.

¹⁹¹ See notes 108-13 *supra* and accompanying text.

¹⁹² See notes 106-07 *supra* and accompanying text.

¹⁹³ S. 2726, 90th Cong., 1st Sess. § 103(a) (1967).

example, to enable the owner to take action independent of the contract to reduce the risks imposed on him by the warranty—are served as adequately by notice at delivery as by notice before the signing of the sales contract. And I fully expect that many owners receive notice about the warranty details only after the excitement of buying a new car has subsided. Owner's manuals have the advantage that they usually are preserved by owners and can be studied at their leisure.

Notice giving at delivery can be, and often is, in the form of an oral explanation as well as in the owner's manual. Oral explanations may well be a most effective way to convey notice to owners, particularly since the owners can ask questions. There are difficulties, however, in enforcing any regulation to compel more frequent and extensive oral explanations.¹⁹⁴ Spot checks by government inspectors posing as new car buyers might be effective, but they would be an expensive form of regulation. It is likely that there would also be some objection to the deceitfulness of the checking system. Another possible enforcement device would be to require dealers to produce statements signed by each purchaser verifying that an oral explanation has been made, but it seems likely that in many instances such statements would become merely another of the forms to be signed by a purchaser and not a meaningful indication of whether an explanation was in fact made.¹⁹⁵ If despite these enforcement difficulties it is decided to require dealers to give oral explanations more frequently, I doubt that the explanation should be required to encompass all warranty details. There is a much greater danger in oral explanations than in written explanations of including so much detail that the recipient only becomes confused and fails to receive notice about even the most important point. As in written explanations, oral explanations can be structured to give major emphasis to the main points, but then the more detailed points are likely to be over-

¹⁹⁴ No such regulation has been specifically proposed. Section 104(b) of the proposed federal legislation concerning notice regulation provides, however, that the FTC may prescribe rules and regulations which include "a description of the methods to be used to assure that the information required by section 103 (described in note 190 *supra*) will be clearly disclosed to the purchaser in a manner which will not mislead him as to the terms and conditions of the guarantee." Perhaps this section could be interpreted to permit the FTC to require oral explanations.

¹⁹⁵ Chrysler already directs its dealers to have owners sign at delivery a prepared card, which is then detached from the owner's manual, verifying that the dealer has explained the provisions of the warranty at delivery. The dealers are directed to keep the signed cards on file in their own dealership, but so far as I have been able to determine Chrysler makes no effort to insure that dealers actually perform this duty. My survey suggests that this practice by Chrysler has no effect on dealers' notice giving habits. Nearly identical percentages of the purchasers from each manufacturer indicated that their dealer had orally explained the warranty's provisions to them.

looked by the recipient of the explanation. Unlike written explanations, the details in oral explanations cannot be studied at the recipient's leisure. For these reasons it may be best to limit the oral explanation to a few major points, such as the maintenance conditions, and to supplement it by an extensive written explanation in the owner's manual.

If the manufacturers do make the required changes in their notice giving practices, it is still possible that there will be insufficient notice received about many warranty provisions, since factors other than notice giving contribute to notice received. In these circumstances it will be necessary to make what is largely a value choice between notice giving and notice received norms. If the choice is for regulation according to notice received norms, the logical first step is to look for measures that a government regulator could take directly, or could require the manufacturers and dealers to take, to raise the amount of notice received to the required level. Unfortunately, little definite is known about what other than notice giving contributes to notice received. Moreover, the likely possibilities often fail to suggest any practical program to increase notice received. For example, prior knowledge of the mechanical workings of a car may be an important determinant of notice received, but it would hardly seem practical to initiate a mass participation educational program in automobile mechanics.¹⁹⁶ If there are no practical measures to increase notice received, application of notice received norms would seem to require the conclusion that warranty provisions for which insufficient notice is received are unenforceable. One possible implementation of this conclusion would be to substitute the results expected by owners for the unenforceable warranty provisions. This regulatory approach would encounter the difficulty of determining what results are expected by owners or, in the probably common situation in which a variety of different results are expected by different owners, of deciding which of the expected results to substitute for a particular warranty provision. These difficulties would be overcome if the expectations of owners were ignored and a regulatory body simply replaced the present warranty with a new simplified one that would be easier to understand and therefore hopefully would lead to more notice received. A final regulatory possibility, which would be more consistent with the principle of freedom of contract, would be to require the manufacturers to stop issuing any warranty containing provisions for which insufficient notice is received, but to reserve for the manufacturers the right

¹⁹⁶ See notes 125-26 *supra* and accompanying text. Another possible determinant of notice received is prior experience in purchasing a car with a long term warranty. See note 124 *supra* and accompanying text. Again, there would seem to be no practical program to increase the experience of owners in dealing with warranties, although this finding suggests that time alone may solve much of the notice received problem.

to issue a redrafted warranty if a sufficient number of owners receive notice about all its important provisions.

Something resembling this latter regulatory approach is taken by the proposed federal legislation providing for notice regulation of all types of warranties and guarantees. One section would forbid issuance of a warranty in circumstances in which the issuer knows that it will normally not be carried out according to its terms,¹⁹⁷ apparently on the theory that any warranty, no matter how qualified, would be inherently misleading in these circumstances. Presumably the incidence of improper denial of repairs under the automobile warranty is not high enough to jeopardize the entire warranty under this provision, but perhaps particular dealers having especially bad records of performing warranty work could be prevented from selling cars with a warranty. Although such regulation could be based on notice norms, its likely effect would be to induce dealers to respect their warranty obligations. The efficacy of this type of regulation would be somewhat diminished, however, by the fact that it requires the administrator to invoke an extreme sanction or do nothing; either he must ban the warranty or do nothing. It would probably be more effective, therefore, if notice giving regulation could be introduced that would require manufacturers and dealers to state their past warranty performance record, in the hope that they would be motivated to improve their performance rating in order to compete for the patronage of owners who would take account of such information in making their purchase decision. Such regulation would require some method measuring the manufacturers' and dealers' warranty performance records, however, and this is a very serious difficulty.¹⁹⁸ Another section of the proposed legislation would forbid issuance of a warranty "if the terms and conditions . . . so limit its scope or application as to deceive a reasonable and prudent prospective purchaser as to the extent of its coverage."¹⁹⁹ The section measures notice received in terms of the reasonable and prudent prospective purchaser, and not in terms of owners generally as does my data showing a high incidence of misunderstanding about the warranty limitations. Nevertheless, if the proposed legislation is enacted, an energetic administrator could use data similar to that I have collected²⁰⁰ to support an argument that the automobile warranty should be banned.

It can readily be seen, therefore, that regulation based on notice

¹⁹⁷ S. 2726, 90th Cong., 1st Sess. § 106(a) (1967).

¹⁹⁸ The provision in the proposed federal legislation dealing exclusively with automobile warranties that requires the manufacturers to keep detailed records about warranty administration and submit annual reports to the Secretary of Commerce might be useful for this purpose. See note 172 *supra* and accompanying text.

¹⁹⁹ S. 2726, 90th Cong., 1st Sess. § 106(b) (1967).

²⁰⁰ See Table II *supra*.

received norms could possibly lead to the banning of many of the limitations on the automobile warranty and perhaps to the entire warranty. Most of the bannings could occur despite the manufacturers' and dealers' best efforts to meet the demands of notice received regulation and without any consideration of whether the banned limitations are essential to the efficient and just administration of the warranty. Before allowing for such results, it is advisable to reevaluate the goals of notice received norms in the context of what can possibly be achieved with automobile warranties and owners. One of the goals usually attributed to notice norms is to assist the consumer in making a more educated purchase decision. Today, however, there is very little to choose between the warranties offered by the major domestic manufacturers.²⁰¹ Theoretically the warranty limitations should enter a prospective purchaser's weighing of the marginal utility of buying a new car against its costs, but I doubt that most consumers are that sophisticated. Perhaps the only warranty information that would be meaningful to the purchase decision of a significant number of owners would be the records of the manufacturers and dealers in performing their warranty obligations.²⁰² Another goal of notice received norms is to enable a purchaser to undertake independent action to reduce some of the risks he has assumed in the purchase contract. For example, a completely logical owner who is aware of the misuse and normal deterioration limitations will operate his car in a safer manner in order to reduce the incidence of malfunctions caused for those reasons. Given the other incentives to operate a car in a careful manner, however, I doubt that knowledge of the warranty will in fact have much additional effect in very many cases. The only conditions knowledge of which is likely to induce independent action in a substantial number of cases are the mainte-

²⁰¹ There is some evidence that warranty considerations entered into a significant number of purchase decisions before the 1967 model year, when the three major manufacturers did not offer essentially identical warranties. Thus, one survey found that in 1966 42% of new car purchasers identified warranty considerations as a "very important" reason for selecting the make they purchased, although less than 3% named warranty considerations as the "most important" reason for selecting that make. MARKET RESEARCH DIV., ADVERTISING DEP'T, U.S. NEWS & WORLD REP., *supra* note 179, at 39, 41. Moreover it is commonly assumed that Ford and General Motors introduced a five year warranty in 1967 principally because they believed Chrysler had acquired a competitive advantage by being the only manufacturer to offer a five year warranty.

²⁰² The survey mentioned in note 201 *supra* revealed that many purchase decisions are heavily influenced by the manufacturers' reputations for producing a mechanically reliable car and the dealers' reputations for servicing it well. Eight per cent of the 1966 purchasers surveyed named the manufacturer's "reputation for quality construction" as the most important reason for selecting a particular make, another 6% identified the "dealer's reputation and interest," and 3% listed the "dealer's ability to service car." MARKET RESEARCH DIV., ADVERTISING DEP'T, U.S. NEWS & WORLD REP., *supra* note 179, at 41.

nance and certification conditions, since they require affirmative action in order to maintain the continuing validity of the warranty.

There are other ends that might be served by requiring notice received of the provisions of the automobile warranty. The manufacturers make as extensive efforts at notice giving as they do principally because they believe that notice received reduces the number of disputes caused by an owner's misunderstanding of his rights. Reduction in the number of such disputes may also be a worthwhile social purpose, but among the various goals of warranty regulation I doubt that much importance should be attached to this end. It may be that owners who are aware of their rights will be more aggressive in asserting those rights when they are denied. If so, then regulation that ensured that owners received notice of warranty provisions would help make regulation designed to adjust individual grievances more effective. It seems doubtful, however, that extensive regulation should rest entirely on this assumption, at least before there is more evidence than is now available of a substantial connection between owner aggressiveness and notice received.

This reexamination of the goals of notice norms leads me to conclude that regulation of warranty provisions with a view toward achieving a high degree of notice received is in most circumstances largely purposeless. Because it is purposeless, and yet might lead to the invalidation of many warranty provisions that according to other norms are quite beneficial, I think such regulation would be positively harmful if not coupled with some consideration on substantive grounds of the value of the provisions banned.²⁰³ There are some warranty provisions for which an important purpose in requiring notice received can be established—principally the maintenance and certification conditions—and it may be quite proper to declare them unenforceable if the manufacturers find it impossible to convey notice of their contents.²⁰⁴ As

²⁰³ Professor Llewellyn proposed an approach to interpretation of standardized form contracts that appears to combine notice received and substantive regulation. He suggested that courts interpret a consumer's assent to a standardized form contract to include an agreement to be bound by the fine print that was not read nor intended to be read, providing that it is not manifestly unreasonable or unfair and does not alter the meaning of the dickered terms. K. LLEWELLYN, *THE COMMON LAW TRADITION—DECIDING APPEALS* 370-71 (1960). It is not altogether clear how Llewellyn would have determined what provisions of the contract were considered fine print and eligible for this special test of validity, but arguably he would have considered some measure of notice received an appropriate test. If so, as applied to the automobile warranty Llewellyn's proposal would become principally a substantive test for unfairness or unreasonableness, since there is a substantial lack of notice received about most of its provisions.

²⁰⁴ Another provision in a standardized form contract involving a consumer which might be banned on a similar ground if insufficient notice is received about it is the provision contained on many credit cards that requires holders to absorb the losses caused by loss or theft of the card until

mentioned previously, there may also be a reasonable basis for notice received regulation that would ban the warranty where there has been a failure to perform its promises adequately, since it is within the power of the manufacturers and dealers to avoid the damaging effects of such regulation. Only notice giving should be required about most of the other warranty limitations. It is true that the actions of some owners are likely to be affected by notice received about these limitations. It seems likely, however, that these owners are also the ones most likely to make an effort to learn about the warranty, and consequently in most instances their rights will be protected by requirements of notice giving. Even if they are not, because these owners represent a minority, I believe it would be inappropriate to protect their interests in receiving notice at the cost of sacrificing many warranty provisions that according to substantive norms may be quite beneficial to all owners and to the public generally.

2. REGULATING SUBSTANTIVE CONTENT

Many of the possible criticisms of warranty administration relate to the substantive results on claims for warranty repairs reached by the warranty administration process. A frequent goal of notice regulation is to induce changes in these results by encouraging owners to exercise their power not to buy until the desired changes have been made. For reasons similar to those that would lead me to largely forego regulation based on notice received norms, however, I doubt that notice regulation of the automobile warranty will have that effect. Perhaps the only significant exception is notice regulation based on the manufacturers' and dealers' warranty performance records, but this regulation will be difficult to implement because it requires construction of a performance rating. I am led to conclude, therefore, that direct regulation of practices will have significant impact on the substantive results of warranty decisions only if it requires changes in the substantive content of the rules and practices that govern those results. Apparently the drafters of the various proposals for regulating the automobile warranty have concluded similarly, for the major stress of those proposals is on direct regulation of the substantive content of the rules and practices for administering the warranty.

The proposals for substantive regulation fall generally into two categories. One category consists of proposed changes in the formal content of the warranty. The other consists of proposals that would require changes in the manufacturers' bureaucratic rules for administering the warranty.

Although they represent a drastic infringement on the manufacturers' contractual freedom, most of the proposals for changes in the formal content of the warranty are likely to be effective in

achieving the ends desired. Because warranty administration is highly legalistic, the manufacturers and dealers can be relied upon to make a good faith application of the warranty. One of the proposed changes in the formal warranty would require the manufacturers to reimburse owners for commercial repairs when no authorized dealer is able to make a repair "within a reasonable period of time."²⁰⁵ The apparent intent of this proposal is to have an indirect effect on the frequency with which dealers delay in making a warranty repair, and perhaps even on the frequency with which they fail to make an adequate repair. Whether it will have that effect depends partly on what will be considered a reasonable time²⁰⁶ but more importantly on whether a substantial number of owners can be induced to assert their rights under this provision. In effect this proposal provides a new mechanism for adjusting individual grievances. Like other mechanisms for adjusting individual grievances, its success in regulating warranty administration will depend on how many owners can be induced to make use of it.

One proposal for a change in the content of the formal warranty may give rise to enforcement problems and be somewhat ineffective in achieving its principal aim for that reason. As presently drafted, the proposed congressional legislation appears to abolish mileage and time limitations on warranty coverage, although there is some reason to doubt whether this is the draftsmen's intention.²⁰⁷ If it is, it probably reflects a complete acceptance of enterprise liability or related theories and a consequent desire to insure that the manufacturers initially assume the entire costs of manufacturing defects.²⁰⁸ The difficulty with this provision is that it presumes an ability to determine easily whether a malfunction was caused by a manufacturing defect or by normal deterioration or misuse. Since this ability often does not exist, the manufacturers would be likely to issue an additional number of specialized rules to guide dealers in situations in which misuse or normal deterioration is probable, and these specific new specialized rules, like the present ones, are likely to resemble time and mileage conditions. If the provision is interpreted as forbidding the formulation of such rules, the probable effect would be to increase the role of good will and owner aggressiveness in determining warranty coverage, which in itself may be inconsistent with enterprise liability theory and similar substantive norms. A dealer without the guidance of specialized rules and without the equipment to make intricate tests to deter-

notice of the loss or theft has been given to the issuer. See Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966).

²⁰⁵ S. 2727, 90th Cong., 1st Sess. § 4(a) (4) (1967).

²⁰⁶ The bill provides that the Secretary of Commerce is to prescribe rules defining a reasonable time for this purpose. *Id.*

²⁰⁷ *Id.* § 4(a) (3) (A). See note 159 *supra*.

²⁰⁸ See note 135 *supra* and accompanying text.

mine the cause of a malfunction would be left with mostly guesswork in doubtful cases. To avoid the mental turmoil of making continual random decisions he would be likely to adopt the only rational measure available, namely good will and owner aggressiveness.

Probably the most important proposals for regulating warranty administration are those that would require changes in the manufacturers' bureaucratic rules for administering the warranty. Most of these proposals require drastic changes in the rules for reimbursing dealers for warranty work, including the abolition of dealer responsibility repairs and a requirement that dealers be compensated for warranty work at commercial rates.²⁰⁹ One proposal could be interpreted to prevent the manufacturers' current requirements that dealers obtain prior approval before making certain warranty repairs.²¹⁰ These proposed changes in the manufacturers' administrative rules would be quite easy to enforce simply by checking the manufacturers' records. They are also likely to be quite effective in altering some of the most criticized patterns of dispute settlement. The most important changes would probably result from the revision of reimbursement rates to make warranty work as profitable for dealers as commercial repairs. Dealers would no longer have an incentive to avoid warranty work, and this should eliminate most improper refusals to make warranty repairs and sharply reduce the number of instances in which an inadequate warranty repair is made because the dealer was in too great a hurry to diagnose the cause of the malfunction or to correct it.²¹¹ The change in reimbursement rates should also largely eliminate the visiting owner problem and reduce the role of good will and owner aggressiveness in warranty decisions, since the amount of reimbursement will make it profitable for dealers to do warranty work without taking account of any additional benefits. The elimination of all prior approval requirements should reduce the delay often associated with those repairs and eliminate those few instances in which the added paperwork of obtaining prior approval induces a dealer to refuse to make a warranty repair.²¹²

²⁰⁹ See notes 163-66 *supra* and accompanying text.

²¹⁰ S. 2727, 90th Cong., 1st Sess. § 6(a)(1)(E) (1967). This provision would require the manufacturer to designate a dealer as its agent for "the acceptance on behalf of the manufacturer of any warranty claim made against . . . the manufacturer with respect to any motor vehicle of that make." The provision could be construed, of course, as only requiring that the dealer be made a depository for the filing of warranty claims by owners, and not that the dealer be empowered to decide the merits of warranty claims as well.

²¹¹ It will be recalled that the present reimbursement rates are in large part responsible for these practices. See notes 68-72 *supra* and accompanying text.

²¹² See text accompanying note 89 *supra*.

Although direct regulation of the manufacturers' administrative rules would be the most effective possible regulation in terms of affecting a substantial change in the patterns of dispute settlement, it also raises the most substantial questions about the advisability of second guessing the manufacturers' expertise in determining the needs of their own bureaucracy. One of the major problems in devising rules for the administration of the warranty is, of course, determining how best to motivate the dealers to make conscientious efforts to honor their obligations in a situation where there is little danger of adverse legal consequences should they refuse. Any system of warranty administration necessarily must accommodate other goals, however, chief among which is minimization of warranty costs—a goal that benefits the owners since most warranty costs are probably met by them ultimately. Another goal of the present administrative rules is to discourage dealer decisions to make warranty repairs in situations in which they should not be made, and, as has been discussed previously, there are policy objections to making too many warranty repairs.²¹³ Both of these latter goals will probably be affected adversely by the proposed changes in the administrative rules, although other proposed regulatory measures, such as the effort to increase quality control, may mitigate these adverse effects.

The difficult choices that must be made in establishing administrative rules are illustrated by comparing the proposed changes in the administrative rules with a program that has already been devised by some of the manufacturers to reduce the high number of arbitrary denials of warranty repairs by dealers. These manufacturers are encouraging all their dealers, and offering financial assistance to some, to build service shops with a large enough capacity that they can handle all their warranty work without having to turn away the profitable commercial repair work.²¹⁴ The effect should be to reduce the total costs to the dealer of making warranty repairs, and consequently there will be less incentive to avoid them. The manufacturers' program will also produce a smaller increase in the costs of warranty administration and a lesser disruption of the controls to prevent too many warranty repairs than would the proposed radical changes in the administrative rules. It can be doubted, of course, whether the changes produced by the manufacturers' program would go as far towards meeting the criticisms of current warranty administration practices as would the proposed radical alteration of administrative rules. Moreover, if every dealer is required to construct extensive service facilities,

²¹³ See text following note 138 *supra*.

²¹⁴ This approach to regulation could be adopted by a governmental regulatory body also. Many states already require automobile dealers to obtain a license to do business, and it would be quite feasible to condition issuance of such licenses on proof that the licensee has adequate service facilities. See note 46 *supra*.

the capital required to operate a dealership will increase and some small businessmen will be foreclosed from entering this activity. Simultaneously there may be a further concentration of the automobile repair business in authorized dealers to the disadvantage of independent repair businesses and to competition generally. The point here, however, is not that the manufacturers' program to expand dealers' service facilities is necessarily inferior or superior to the suggested changes in current administrative rules in meeting the mixture of goals to be achieved by a warranty administration system. It is only to illustrate that designing a system of administrative rules that best satisfies this mix of goals raises the number of technical issues. The manufacturers, with their long experience at inducing dealers to act in particular ways and their detailed knowledge of the cost structure of the industry, may be better qualified to resolve these issues than some government body that might become involved in direct regulation of the warranty.

The draftsmen of the various proposals for regulating the manufacturers' administrative rules obviously reject the implication of these conclusions about the comparative expertise of government regulators and the manufacturers, and in doing so they may be wise. The establishment of administrative rules is not entirely a matter of expertise. There is considerable room for disagreement about the goals to be served by the administrative rules and about the degree of importance to be attached to each of the various goals. Many of the criticisms that lead to consideration of direct regulation of the manufacturers' administrative rules may be caused by the manufacturers' decision to place too much emphasis on the goal of minimizing warranty costs at the expense of the goal of fair and even handed warranty administration. Historically, of course, our society has purported to allow the forces of competition to become the chief regulator of decisions by private enterprise. And competitive pressures do exert influence over the formulation of the manufacturers' administrative rules. A manufacturer who emphasized minimization of warranty costs to such an extent that there was a vastly greater amount of arbitrary denial of warranty repairs by his dealers than by other dealers would undoubtedly suffer a loss in new car sales.²¹⁵ There are several possible reasons for not relying on competition to be the sole regulator of the manufacturers' administrative rules. In the first place, some of the most serious criticisms of warranty administration involve a clear denial

²¹⁵ A manufacturer acting in this manner might also lose a number of his best dealers, who could sign franchise contracts with other manufacturers who allowed them to operate their dealerships in a manner more consistent with their own ideas about good business practices. The manufacturers are keenly aware of the value of a network of high quality dealers, and the prospect of losing a number of good dealers because of warranty administration policies would alone probably be sufficient to induce a manufacturer not to adopt the policies.

of contractual rights, and we have never been willing to rely solely on competitive forces to insure the enforcement of legal rights. Secondly, the automobile industry is oligopolistic, with substantial economic barriers to entry and with a considerable history of parallelism in the formulation of the terms of the sales contract. Consequently, competition may not be as good a regulator as in more decentralized industries and, given the importance of automobiles in American life, this reason may be considered sufficient to justify governmental regulation.

If regulation of administrative rules is to be justified on this ground, however, one would hope that the legislation would at least take account of its largely experimental nature. As experience is acquired about the effects of the new set of administrative rules, there may be a need to make changes to accommodate better the mix of goals any warranty administration system must achieve. The proposed federal legislation takes some account of this need for flexibility by delegating the duty to devise the detailed standards for warranty and franchise contracts to an administrative agency.²¹⁶ The difficulty with the legislation, however, is that it restricts the administrator's discretion by prescribing the most fundamental changes in the administrative rules. I believe it would be wiser if the bill only stated the goals to be achieved and vested broad discretion in the Secretary of Commerce or some other administrator to promulgate the detailed regulations. The administrator should then have the power to change the regulations to reflect the new experience.

VI. SOME CONCLUSIONS

The legal system almost never enters directly into dispute settlement under the automobile warranty, although it may have certain indirect effects. Nor are the results of dispute settlements generally the product of bargained agreement between the disputants. Rather the decisions on owner claims for warranty repairs, even when the owner contests an original denial of the claim, are dispensed by a bureaucracy according to a set of predetermined rules. Although the dispute settling system is highly legalistic with the principal determinant of the rules governing the bureaucracy being the substantive content of the formal contract, other nonlegal factors, such as the desire to preserve good will, exert influence. The disposition of warranty claims resembles, therefore, the disposition of many claims on government, such as claims for welfare or social security payments. In that situation also the results of claims are dispensed by a bureaucracy applying a legalistic set of rules, with

²¹⁶ The bill would specifically authorize the Secretary of Commerce to require the inclusion of provisions in warranty and franchise contract that he considers necessary "to protect manufacturers from fraudulent and unconscionable warranty (and franchise) claims." S. 2727, 90th Cong., 1st Sess. §§ 4(a)(9)(B), 6(a)(9)(B) (1967).

little interference by the legal system.²¹⁷ Perhaps the principal difference, not an unimportant one, is that government agencies receiving a large number of claims often attempt to enforce some separation of investigative and adjudicative functions, whereas the warranty administration bureaucracy tends to be undifferentiated along these lines.

It is interesting to compare dispute settlement under the automobile warranty with Professor Stewart Macaulay's findings about dispute settlement under contracts between businessmen (mostly manufacturers).²¹⁸ Professor Macaulay found that contract disputes between businessmen, like warranty disputes, are rarely referred to the formal legal system for disposition. On the other hand, dispute settlement between businessmen tends to be much more a process of reaching a bargained agreement than it is under the automobile warranty, a result that might be expected given the relative equality of the power possessed by parties to a businessmen's contract dispute. Most significantly, Macaulay found that "often [businessmen] will never refer to the [contract] but will negotiate a solution when the problem arises apparently as if there had never been any original contract."²¹⁹ In contrast, dispute settlement under the automobile warranty is governed to a much greater extent by the terms of the contract, despite the fact that one of the parties to the contract usually lacks the motivation and resources to invoke the aid of the formal legal system. There are explanations for this difference. The automobile manufacturers could not negotiate the resolution of each claim for a warranty repair without vesting much more decisionmaking authority in dealers and their employees than they consider desirable. Consequently they have established a bureaucracy with rules to guide the lower echelons of the decisionmaking process.²²⁰ There are various pressures that the bureaucratic rules largely conform with the legal rules, one of the principal pressures being that the bureaucratic rules are necessarily somewhat visible to authorities who are in a position to judge the propriety of dispute settlement under the warranty. Perhaps the most important reason for legalism in automobile warranty dispute settlement, however, is that the manufacturers are in a bargaining position that allows them to insist that their choice for rules of dispute settlement be included

²¹⁷ See Handler, *Controlling Official Behavior in Welfare Administration*, 54 CALIF. L. REV. 479 (1966).

²¹⁸ Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

²¹⁹ *Id.* at 61.

²²⁰ It is significant in this regard that in those instances in which the manufacturers do provide for a large degree of discretion in determining eligibility for a free repair—for example, in deciding when to make an over warranty policy adjustment—they nearly always require that dealers obtain prior approval so that the effective decision can be made by officials higher up in the hierarchy. See text preceding note 80 *supra*.

in the contract at the time of formation.²²¹ Legalism therefore costs the manufacturers little. Because businessmen dealing with other businessmen will not so often be in that position, there is a tendency, I believe, to defer hard bargaining about the rules for dispute settlement until it becomes clear that rules will be needed.

It is not possible to determine the best way for the legal system to regulate the outcomes of automobile warranty dispute settlements, since the choice of type of regulation depends on an accommodation of a large number of factors, many of them normative. Moreover, it is somewhat misleading to compare the efficacy of different types of regulation, as I have done, since to some extent each regulatory approach is designed to meet different criticisms of warranty administration.²²² For this reason, probably most people would conclude that a balanced regulatory program should employ several types of regulation simultaneously. Within this limitation however, it is possible to reach some tentative conclusions about the likely efficacy of particular types of regulation.

It seems fruitless to rely on the court structure to regulate warranty dispute settlement. I suspect that the same conclusion can be reached with regard to regulation of many other consumer transactions in which the amount in controversy is usually small. It is more difficult to determine whether any other system for adjudicating or mediating individual disputes can be effective in regulating warranty disputes. Certainly nothing presently attempted along this line has been very effective, but it is quite possible that an agency that lacked formal procedures, was well publicized, had a reputation for effectiveness, and resort to which cost the consumer little, would be successful in inducing disappointed warranty claimants to refer disputes to it.

The most evident way to have a substantial impact on automobile warranty dispute settlement is to initiate direct regulation of the manufacturers' rules and practices for administering the warranty. My inquiry into the workings of the warranty transaction leads me to believe, however, that direct regulation of the rules and practices with regard to notice is not likely to be very effective in altering current patterns of dispute settlement. Notice regulation usually presupposes that more notice giving will induce consumers

²²¹ Professor Evan, in commenting on Macaulay's article cited in note 218 *supra*, advanced the hypothesis that "the greater the bargaining position differential between the [parties to an agreement], the more likely their transactions will be contractual in nature." Evan, *Comment*, 28 AM. Soc. Rev. 67, 68 (1963). My findings in this case study are consistent with that hypothesis.

²²² It is only somewhat misleading because all the regulatory approaches share some goals—most importantly, the goal of reducing the incidence of the high number of arbitrary denials of and delays in obtaining warranty repairs. As to these goals, it is quite fruitful to examine the comparative efficacy of different regulatory approaches.

to make a more discriminating decision to purchase or to make arrangements independent of the contract which will reduce the risks assumed in the contract. In many consumer transactions more notice will induce protective action of that type on the part of the consumer. Certainly the extreme opposition of industry to the "truth in packaging" law recently enacted by Congress suggests that that law will have an effect on many consumers' decisions to purchase.²²³ I doubt that additional notice giving could induce very many automobile owners to take such protective action, however, partly because increased notice giving may not generate a great increase in notice received, but primarily because the details of warranty coverage and administration do not seem very important to most owners at the time of purchase when the most practical protective action can be taken.²²⁴ There may also be other areas where notice regulation will be ineffective or only partially effective for similar reasons. For example, it is frequently suggested that consumer credit transactions can be effectively regulated by requiring more notice. Because many consumers can only afford to buy expensive items on credit, and since advertising and other societal pressures often stress the necessity of owning certain expensive goods, many consumers may not be dissuaded from buying regardless of the one-sided nature of the credit terms and even assuming increased notice giving results in additional notice received.²²⁵

The most effective regulation of automobile warranties would be regulation of the substantive content of the manufacturers' rules and practices for administering the warranty. Assuming enforcement, direct substantive regulation most likely will have a substantial impact on dispute settlement. And direct substantive regulation is often quite easy and cheap to enforce, particularly if informal dispute settlement in the consumer transaction concerned has been highly bureaucratized. For then it is possible to rely on existing private bureaucracy to implement the governmentally formulated rules of dispute settlement, with the regulating body needing only to check with the upper hierarchies where the bureaucratic rules are formulated to determine the extent of obedience. If the authority to formulate rules for dispute settlement

²²³ See Hart, *Can Federal Legislation Affecting Consumers' Economic Interests Be Enacted?*, 64 MICH. L. REV. 1255 (1966).

²²⁴ In discussing oral explanations of the warranty during my interviews with dealers, the dealers and their salesmen constantly stressed the difficulty in inducing owners to listen to oral explanations at the time of delivery. They stated that many owners "just want to get into their new car and take a drive."

²²⁵ Another commentator, although also lacking empirical data, has reached a similar conclusion about notice regulation of consumer credit. Comment, *Consumer Legislation and The Poor*, 76 YALE L.J. 745 (1967). The author devotes most of his argument to the responses of the poor, but he asserts that the same principle holds true for the affluent. *Id.* at 767.

is more dispersed, such as in the area of consumer credit, enforcement problems are more difficult.

Although direct governmental regulation of the substantive content of the rules and practices of warranty administration is the most effective way to meet most of the criticisms of current patterns of dispute settlement, it also raises the most serious problems concerning the advisability of interfering with the manufacturers' freedom and expertise in devising their own warranty rules and practices. Regulation of practices regarding notice and the creation of new mechanisms to adjust individual grievances represent a less extensive interference with the manufacturers' expertise, but they also are likely to have a smaller impact on current patterns of dispute settlement. In short, in considering regulation of the automobile warranty there is a conflict between effective regulation, in terms of having an impact on present practices, and protecting the manufacturers' freedom and expertise in formulating their own rules of warranty administration.