

Attorney's Fees for Consumers in Warranty Actions—An Expanding Role for the U.C.C.?

INTRODUCTION

Public awareness of consumer warranty problems has increased tremendously during the past few decades.¹ The dependence today's consumers place on distantly manufactured goods and their reliance on flashy mass media advertising have led courts and legislatures to take steps protecting consumers from deceptive selling practices and defective products.² To this end, modern warranty law has struggled to achieve a balance of power between consumers and warrantors such that the latter will be provoked by the former to provide a product at a quality and price satisfactory to both.³ This balance of power can be achieved only if full redress for the wronged consumer is made realistically obtainable. Only then can the consumer impel the warrantor to repair defects and enhance the caliber of his product.

Since the early 1960's, the Uniform Commercial Code ("U.C.C.") has been the principal supplier of consumer warranty protection.⁴ One of the avowed purposes of the U.C.C. is to provide full redress to the aggrieved buyer.⁵ The U.C.C. provides that the measure of damages for breach of warranty is generally the difference between the value of the goods as

1. See, e.g., Mueller, *Contracts of Frustration*, 78 YALE L.J. 576 (1969); Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395 (1966). For an enlightening historical analysis tracing developments in the law of warranty from medieval England to the Magnuson-Moss Warranty Act, see generally Sullivan, *Innovation in the Law of Warranty: The Burden of Reform*, 32 HASTINGS L.J. 341 (1980).

2. This Note will not attempt to trace the rise and fall of the doctrine of caveat emptor. That topic has been quite adequately treated. See generally Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

3. The impact of modern warranty law on the balance of power dilemma is examined in Rothschild, *The Magnuson-Moss Warranty Act: Does It Balance Warrantor and Consumer Interests?*, 44 GEO. WASH. L. REV. 335 (1976).

4. The U.C.C. is law today in every state but Louisiana and is also law in the District of Columbia. The jurisdictions enacting the U.C.C. and the dates of such enactments are listed in 1 U.L.A. ix (master ed. 1976) (Table 1).

5. U.C.C. § 1-106(1) (1978). See *infra* text accompanying notes 41-42. Hereinafter, all references to the Uniform Commercial Code are to the 1978 official text.

purchased and their value as warranted.⁶ Additionally, the buyer is normally allowed to recover incidental and consequential damages resulting from the seller's breach.⁷ The U.C.C. clearly strives to make whole the consumer wronged by a seller's breach of warranty.

Conventional application of U.C.C. remedies will not, however, permit the warranty plaintiff to be made whole, because he ordinarily will not be entitled to reimbursement for expenses incurred in retaining counsel and bringing his claim. This result derives from the American rule prohibiting an award of attorney's fees to the successful litigant without a statutory or contractual provision expressly authorizing such an award.⁸ The U.C.C. does not explicitly authorize attorney's fees, and the usual seller-oriented purchase contract is unlikely to be so generous as to grant attorney's fees to successful troublemakers.⁹ Therefore, although authority exists to the contrary,¹⁰ the American rule precludes the recovery of attorney's fees as incidental or consequential damages under the U.C.C.¹¹

Many legislative bodies have noted the inequities engendered by the American rule and have acted recently to overturn it with legislation in a wide range of fields.¹² Several recent statutes, in an attempt to foster quality control by manufacturers and encourage consumer action if product quality fails, expressly award reasonable attorney's fees to consumers successful in

6. U.C.C. § 2-714(2) provides: "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. . . ." A useful measure of damages under this formula is the cost of repair or replacement. *See, e.g.*, *R. Clinton Constr. Co. v. Bryant & Reaves, Inc.*, 442 F. Supp. 838 (N.D. Miss. 1977); *Downs v. Shouse*, 18 Ariz. App. 225, 501 P.2d 401 (1972).

7. U.C.C. § 2-714(3).

8. *See infra* notes 19-38 and accompanying text.

9. *See Devore v. Bostrom*, 632 P.2d 832, 836-37 (Utah 1981) (Stewart, J., dissenting):

This action is not between merchants; it is not between persons of relatively equal bargaining power. The dispute is between a consumer and a merchant who dealt on the basis of a contract of adhesion in which the seller specifically provided for attorney's fees to be paid to it by the buyer in the event the seller found it necessary to resort to judicial relief.

10. *Cady v. Dick Loehr's, Inc.*, 100 Mich. App. 543, 299 N.W.2d 69 (1980).

11. Virtually every court considering the question has denied recovery. *E.g.*, *Keck v. Wacker*, 413 F. Supp. 1377 (E.D. Ky. 1976); *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 521 P.2d 1119 (1974); *Nick's Auto Sales, Inc. v. Radcliff Auto Sales, Inc.*, 591 S.W.2d 709 (Ky. App. 1979); *Universal C.I.T. Credit Corp. v. State Farm Mut. Auto. Ins. Co.*, 493 S.W.2d 385, 393 (Mo. App. 1973); *Equitable Lumber Corp. v. I.P.A. Land Dev. Corp.*, 38 N.Y.2d 516, 344 N.E.2d 391, 381 N.Y.S.2d 459 (1976); *Hardwick v. Dravo Equip. Co.*, 279 Or. 619, 569 P.2d 588 (1977); *Modine Mfg. Co. v. North East Indep. School Dist.*, 503 S.W.2d 833 (Tex. Civ. App. 1974); *Devore v. Bostrom*, 632 P.2d 832 (Utah 1981); *Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 265 N.W.2d 513 (1978).

12. To date, Congress has enacted nearly 100 federal statutes authorizing awards of attorney's fees to successful litigants. *See Berger, Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 303 n.104 (1977) (collecting 75 such federal statutes); *see also Brock, Statutory Attorney Fees in Texas*, 40 Tex. B.J. 139 (1977); Douglas, *Statutory Authorization for Attorney's Fees in New Hampshire*, 17 N.H.B.J. 205 (1976).

warranty suits.¹³ Allowing the recovery of attorney's fees in warranty actions is becoming increasingly common.¹⁴ The U.C.C., however, remains constrained by the American rule.¹⁵

This Note explores the desirability of allowing attorney's fees in breach of warranty actions under the U.C.C. Development of this topic will require forays into several distinct legal areas. Part I discusses the American rule and its unfortunate effect on warranty law.¹⁶ Part II analyzes U.C.C. section 2-715 to determine whether attorney's fees conform to the general intentment of incidental or consequential damages. Part III is a brief overview of consumer legislation authorizing attorney's fees in warranty actions. Several of these statutes are examined to define the extent to which they either supplant or complement the U.C.C., and to assess the effect they have had on warranty protection. To the extent a consumer can utilize one of these statutes, it will be unnecessary to extend conventional remedies offered by the U.C.C. The Note concludes that modification of U.C.C. substance or interpretation will be necessary until federal remedies are wielded more often and effectively or state law is massively revised.

I. THE AMERICAN RULE

English courts have had the authority for several centuries to award attorney's fees to prevailing litigants.¹⁷ Although it is not clear why the

13. See *infra* notes 78-139 and accompanying text. The existence of consumer warranty statutes authorizing fee-shifting provides arguments both for and against extension of the U.C.C. to allow the recovery of attorney's fees in consumer warranty actions. These statutes arguably embody a generalized legislative judgment that consumers need encouragement to litigate warranty disputes; a conclusion which logically should apply regardless of the type of warranty breached or the product involved. On the other hand, the existence of these statutes might obviate any need to extend U.C.C. remedies, because a consumer can often utilize a fee-shifting warranty statute in conjunction with the U.C.C. or alone to recover attorney's fees. This Note accepts the former argument and attempts to refute the latter.

14. See *Volkswagen of Am., Inc. v. Harrell*, 431 So. 2d 156 (Ala. 1983); *Nobility Homes, Inc. v. Ballentine*, 386 So. 2d 727 (Ala. 1980); *Sherer v. DeSalvo*, 634 S.W.2d 149 (Ark. Ct. App. 1982); *Hanks v. Pandolfo*, 38 Conn. Supp. 447, 450 A.2d 1167 (1982); *Black v. Don Schmid Motor, Inc.*, 232 Kan. 458, 657 P.2d 517 (1983); *Champion Ford Sales, Inc. v. Levine*, 49 Md. App. 547, 433 A.2d 1218 (1981); *Ventura v. Ford Motor Corp.*, 180 N.J. Super. 45, 433 A.2d 801 (1981); *Massingale v. Northwest Cortez, Inc.*, 27 Wash. App. 749, 620 P.2d 1009 (1980); *Bixby*, *Judicial Interpretation of the Magnuson-Moss Warranty Act*, 22 AM. BUS. L.J. 125, 154-62 (1984).

15. See *infra* notes 39-81 and accompanying text.

16. This Note need not argue for the wholesale rejection of the American rule. The commentators listed *infra* note 20 make the case for its abandonment convincingly enough. This Note will instead criticize the American rule solely to demonstrate that its operation has prevented courts from fully exploring the bounds of recoverable damages in one particular type of legal action: a breach of warranty action brought by a consumer.

17. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967).

English practice of fee-shifting was not embraced in the United States,¹⁸ the American rule now has become so deeply ingrained in this country's legal system that its general abandonment is highly unlikely.¹⁹ The American rule has been the subject of both intense criticism²⁰ and powerful support.²¹ While its detractors have demonstrated its many shortcomings, the American rule has survived on the strength of certain policy justifications. An examination of these justifications as applied to consumer breach of warranty claims will be helpful in assessing the merit of the American rule in the field of consumer warranty protection.

Ironically, the most compelling justification for the American rule mirrors exactly the most compelling justification for the English rule. Proponents of the American rule argue that the English rule inhibits access to the courts because requiring the losing party to pay the prevailing party's attorney's fees raises the stakes of litigation and discourages the assertion of legitimate

18. Apparently the English rule was originally adopted in the American colonies but was somehow slowly lost. Professor Ehrenzweig has described this process as a "gradual forgetting" of the sounder rule. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792, 799 (1966). This "gradual forgetting," according to Ehrenzweig, is attributable to pure historical accident:

[T]here are good reasons for assuming that what is now so often represented as a noble postulate for restraint of the winner in a chance contest, is actually due to the simple fact that the New York legislature in 1848, in attempting to perpetuate what it considered a sound legal rule of recovery of attorneys' fees by the prevailing party, made the fatal mistake of fixing the amount recoverable in dollars and cents rather than in percentages of the amount recovered or claimed. It was this mistake probably that caused lawyers and courts, when rising living costs began to obscure the real purpose of the statutory amounts of "costs," gradually to forget the meaning of those amounts.

Id. at 798-99.

19. That the American rule would control in this country's federal courts was settled by a line of early Supreme Court cases. See *Oelrichs v. Spain*, 82 U.S. (15 Wall.) 211 (1872); *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1851); *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796). The Court has recently reaffirmed, in no uncertain terms, the continued vitality of the rule in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

There are of course exceptions to the American rule. See generally Note, *Theories of Recovering Attorneys' Fees: Exceptions to the American Rule*, 47 UMKC L. REV. 566 (1979).

20. See generally Cosway, *Attorney's Fees as an Element of Damages*, 15 U. CIN. L. REV. 313 (1941); Ehrenzweig, *supra* note 18; Kuenzel, *The Attorney's Fees: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963); McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761 (1972); Mayer & Stix, *The Prevailing Party Should Recover Counsel Fees*, 8 AKRON L. REV. 426 (1975); Stirling, *Attorney's Fees: Who Should Bear the Burden?*, 41 CAL. ST. B.J. 874 (1966); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966); Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216 (1967); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636 (1974).

21. Support for the American rule comes primarily from the courts rather than from commentators. See, e.g., *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1966); *Mighty Midgets, Inc. v. Centennial Ins. Co.*, 47 N.Y.2d 12, 21-22, 389 N.E.2d 1080, 1085, 416 N.Y.S.2d 559, 564 (1979).

but uncertain claims.²² Advocates of the English rule, on the other hand, urge that the American rule inhibits access to the courts by failing to fully compensate the prevailing litigant.²³ Plaintiffs often forgo meritorious lawsuits because the expense of attorney's fees is greater than the amount sought to be recovered.²⁴ Likewise, defendants often settle meritless lawsuits because the expense of attorney's fees in defending the claim exceeds the plaintiff's potential recovery.²⁵ The primary dispute between the proponents of each rule simply reflects a basic disagreement as to which rule deters to a greater extent free access to the courts.

While the final resolution of the access debate must await empirical research, it is safe to postulate that the circumstances of the particular case determine to a large extent which rule tends to exclude the greater class of litigants.²⁶ The American rule appears to deter small claims regardless of their merit.²⁷ For instance, even when the legal claim is clear and the facts undisputed, the amount sought may be insufficient to justify hiring an attorney and conducting litigation when these expenses will be subtracted from the recovery. The English rule, on the other hand, appears to deter claims that are especially uncertain.²⁸ For example, when the claim is disputed or rests upon novel legal grounds, the likelihood of success may not justify its assertion because of the substantial risk that two attorneys, rather than merely one, will have to be paid.

Although the tremendous diversity of consumer warranty disputes discourages broad generalizations, the American rule probably deters a greater class of warranty plaintiffs than the English rule. With few exceptions, consumer warranty claims are trivial in amount compared to virtually any other type of legal claim.²⁹ Damages for breach of warranty do not include punitive damages, absent fraud.³⁰ Nor does the simple warranty action include

22. Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C.L. REV. 613, 618 (1983); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619, 641 (1931).

23. Mallor, *supra* note 22, at 616; Walthall, *Awards of Attorneys' Fees in the Absence of Statute: Trends and Prospects in the Fifth Circuit*, 10 CUM. L. REV. 359, 362-63 (1979).

24. Mallor, *supra* note 22, at 616-17.

25. *Id.* at 617.

26. Walthall, *supra* note 23, at 366-67 n.22.

27. *Id.*

28. *Id.*

29. According to the results of a survey by the Center for Auto Safety, a consumer advocacy group founded by Ralph Nader, even automobile warranty claims—surely one of the most expensive subjects of breach of warranty suits—typically generate damages only slightly in excess of \$6,000. Nat'l L.J., July 4, 1983, at 40, col. 3.

30. At common law, punitive damages ordinarily are not recoverable for a breach of contract unless the breach also involves tortious conduct. *Kiser v. Gilmore*, 2 Kan. App. 2d 683, 587 P.2d 911 (1978). This rule is incorporated into the Uniform Commercial Code under U.C.C. § 1-106(1). *Ford Motor Co. v. Mayes*, 575 S.W.2d 480 (Ky. Ct. App. 1978). Incidental and consequential damages under U.C.C. § 2-715, *see infra* notes 46-81 and accompanying text,

claims for personal injury or wrongful death to hike the recovery. The plaintiff merely seeks a replacement for a defective product or, more typically, a refund of the purchase price, plus incidental and consequential damages. Only when the product's purchase price is unusually high will the plaintiff's recovery after a trial exceed his attorney and litigation expenses.³¹ If consumer warranty protection is to be truly effective, the consumer must be able to afford to have his case heard in court. The American rule and the relative insignificance of the amount of the claim combine to deny warranty plaintiffs fair access to the courts.

Another asserted justification for the American rule is that it simplifies the task of already-congested courts.³² When each litigant is responsible for his own attorney's fees, the court is not required to hear motions, evidence, and arguments on the proper amount of recoverable fees.³³ The English rule concededly can lengthen litigation by placing this extra burden on the courts. As applied to consumer warranty actions, however, this justification is stripped of much of its merit. The initial effect of abandoning the American rule would be to stimulate the assertion of those claims that were previously deterred—small but legitimate warranty claims. The manufacturer, no longer wielding the *in terrorem* power of the American rule, will be much more inclined to consider settlement, noting both the legitimacy of the claim and the modest amount sought.³⁴ Few of the suits spurred by discarding the American rule would even proceed to trial, and any potential for litigation protraction would be negated.³⁵

do not include punitive damages. *Sims v. Ryland Group, Inc.*, 37 Md. App. 470, 378 A.2d 1 (1966). *But see* *Coyle Chevrolet Co. v. Carrier*, 397 N.E.2d 1283 (Ind. App. 1978) (award of punitive damages allowed where defendant himself presented issue of punitive damages to jury).

31. Even when an automobile is the subject of a warranty suit, the amount of attorney's fees incurred in bringing the suit to trial are typically scarcely less than the amount of the recovery. *See* *Black v. Don Schmid Motors, Inc.*, 232 Kan. 458, 657 P.2d 517 (1983) (plaintiff awarded \$3,000 in attorney's fees under fee-shifting provision of the Magnuson-Moss Warranty Act).

32. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1966); *Oelrichs v. Spain*, 82 U.S. (15 Wall.) 211 (1872).

33. In *Oelrichs v. Spain*, 82 U.S. (15 Wall.) 211, 231 (1872), the Court expressed this precise concern: "A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause." *See also* *Mallor*, *supra* note 22, at 618.

34. *See* R. POSNER, *ECONOMIC ANALYSIS OF LAW* 350-51 (1972). Posner argues that reimbursement of attorney's fees would "encourage settlements by giving the parties added incentive to estimate the likely outcome of litigation correctly: the party has more to lose from an incorrect estimate, if one consequence of litigating and losing is that he must reimburse the other party's litigation expenses." *Id.* at 351.

35. In any event, in the frequent cases when statute, policy, or contract has mandated fee-shifting, the courts have regularly assumed the extra burden of determining proper awards. Presumably, the courts over time have developed a certain amount of proficiency in this area. *See generally* *Berger*, *supra* note 12 (suggesting an analytical framework to be used in fixing fees: hours justifiably expended, multiplied by the attorney's market rate, multiplied by the risk of nonrecovery).

The manufacturer's inclination to settle may indeed have a more far-reaching effect. Once the manufacturer can no longer depend on the American rule to deter claims against him, he will have to deter claims by improving product quality. This would be the most socially desirable assurance against breach of warranty claims, more palatable than the present means of deterrence, the prohibition of fee-shifting. Abandoning the American rule in the field of consumer warranties, then, could eventually lead to enhanced quality control as well as enhanced consumer redress. Improving product quality and consumer remedies are in fact the twin goals of the recent wave of consumer warranty statutes, most of which award attorney's fees to successful warranty plaintiffs.³⁶

Other justifications for the American rule do not require application to the consumer warranty context for repudiation.³⁷ The most persuasive of these justifications is that attorney's fees are simply too remote from the original injury to be recoverable as compensable damages.³⁸ The analysis of the remoteness question is identical in all actions for damages, but in the breach of warranty context the analysis takes on an added statutory dimension. Section 2-715 of the U.C.C. defines the extent to which items of damage resulting from the seller's breach may be recovered. These items of damage are termed incidental and consequential damages. A decision to allow a particular item of damage under section 2-715 represents a determination that it is not too removed from the original injury to be included in the measure of damages. Whether attorney's fees are too remote to be recoverable under the language of section 2-715 is the subject of the next section of this Note.

II. SECTION 2-715

Section 2-715 of the U.C.C. does not explicitly provide for the recovery of attorney's fees. The U.C.C. draftsmen were, of course, aware of the

36. See *infra* note 91.

37. Proponents of the American rule fear that prevailing attorneys may charge higher fees if such fees can be shifted to the opponent. McCormick, *supra* note 22, at 639. The weakness of this argument lies in the court's discretion to award only a reasonable fee. McLaughlin, *supra* note 20, at 781.

Another justification for the American rule is that it correctly allocates litigation decisions to the parties and their attorneys, an arrangement more efficient than one authorizing official review. Walthall, *supra* note 23, at 368-69 (hypothesizing that the desire for decentralized private decisionmaking may explain in large part the adoption of the American rule in this country). But the nineteenth-century philosophy that recognized the superiority of individual bargaining and contract law is no longer persuasive. Modern courts and legislatures have often found it expedient to override the interest in private decisionmaking when other policies are deemed more pressing. See generally G. GILMORE, *THE DEATH OF CONTRACT* (1974); Ellinghaus, *In Defense of Unconscionability*, 78 *YALE L.J.* 757 (1969).

38. In *Stewart v. Sonneborn*, 98 U.S. 187, 197 (1878), the Court noted: "The fees of counsel in prosecuting this case were no part of the consequences naturally resulting from the action of the defendants in suing out the decree and warrant in bankruptcy. They were not what the defendants ought to have foreseen."

American rule and presumably intended that the section work no change upon prior law. If the intent of the drafters is temporarily put aside, however, as resting upon a premise that is flawed when applied to the consumer warranty context³⁹ and has been eroded by recent warranty legislation,⁴⁰ then one is left with only the words of section 2-715. Guidance in interpreting this section can be found in two of the U.C.C.'s general introductory provisions, sections 1-106(1) and 1-103. Section 1-106(1) declares that "[t]he remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed."⁴¹ This section supports any construction of section 2-715 which results in the prevailing litigant being made whole. Because a successful plaintiff cannot be made whole when he cannot recover his attorney's fees, section 1-106(1) clashes on its face with the American rule.⁴²

The force of section 1-106(1) is tempered by the effect of section 1-103. Section 1-103 provides that, unless displaced by particular provisions, principles of the common law should supplement all provisions of the U.C.C.⁴³ Because the American rule represents the well-established common law in this country, section 1-103 supports its incorporation into the U.C.C. Nevertheless, the continued vitality of the common law demands that the law change to better reflect shifting societal values.⁴⁴ The consumer protection movement in this country represents just such a shift in societal values. If, on consumer protection grounds, a convincing argument can be made that attorney's fees should be allowed in warranty actions, the common law is capable of giving legal status to that argument.⁴⁵ Section 1-103 need not bar in perpetuity the recovery of attorney's fees under the U.C.C. simply because the current practice in this country is to deny such a recovery.

39. See *supra* notes 29-38 and accompanying text.

40. See *infra* notes 82-139 and accompanying text.

41. U.C.C. § 1-106(1).

42. *Contra* Merrimack Farmers Exch., Inc. v. Elliott, 111 N.H. 121, 276 A.2d 258 (1971); Neri v. Retail Marine Corp., 30 N.Y.2d 393, 285 N.E.2d 311, 334 N.Y.S.2d 165 (1972).

43. U.C.C. § 1-103 provides:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

44. As the Court noted in *Funk v. United States*, 290 U.S. 371, 383 (1933), "[i]t has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." See also *Brooks v. Robinson*, 259 Ind. App. 16, 284 N.E.2d 794 (1972); *Miller v. Monsen*, 228 Minn. 400, 37 N.W.2d 543 (1949).

45. Indeed, the common law rule regarding attorney's fees in this country apparently drifted away from the practice of fee-shifting during the colonial years for wholly unpersuasive reasons. See *supra* note 18.

A. Incidental Damages

Section 2-715(1) of the U.C.C. defines the scope of incidental damages.⁴⁶ Incidental damages are "intended to provide reimbursement for the buyer who incurs reasonable expenses in connection with the handling of rightfully rejected goods or goods whose acceptance may be justifiably revoked."⁴⁷ Section 2-715(1) lists illustrations of several typical kinds of incidental damages, but this list is not intended to be exhaustive.⁴⁸ Courts generally have interpreted section 2-715(1) narrowly, awarding incidental damages in two broad categories only: when expenses have been incurred in either handling nonconforming goods⁴⁹ or effecting cover.⁵⁰ Other more attenuated, and usually more significant, damages are termed consequential and are awarded, if at all, under section 2-715(2).

At least one court, however, has strayed from this traditional interpretation by holding that section 2-715(1) can be read to include attorney's fees as incidental damages resulting from a seller's breach of warranty. In *Cady v. Dick Leohr's, Inc.*,⁵¹ involving the sale of a defective motor home, the buyer prevailed in a breach of warranty action. The trial court, in addition to awarding \$7,155 in damages,⁵² awarded the plaintiff \$2,930 in attorney's fees.⁵³ The Michigan Court of Appeals agreed that attorney's fees could be awarded under section 2-715(1) at the discretion of the trial court as a

46. U.C.C. § 2-715(1) provides:

Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

47. U.C.C. § 2-715 comment 1.

48. *Id.*

49. *E.g.*, *Brogie v. MacKay-Smith*, 541 F.2d 453 (4th Cir. 1976) (expenses for care and feeding of lame horse); *Lewis v. Mobil Oil Corp.*, 438 F.2d 500 (8th Cir. 1971) (repair and replacement of mechanical parts damaged by unsuitable oil); *La Villa Fair v. Lewis Carpet Mills, Inc.*, 219 Kan. 395, 548 P.2d 825 (1976) (handling, transportation, and storage of defective carpeting); *Lanners v. Whitney*, 247 Or. 223, 428 P.2d 398 (1967) (care and custody of plane misrepresented as airworthy); *Devore v. Bostrom*, 632 P.2d 832 (Utah 1981) (insurance, license plates, lost wages, and interest on the purchase price of defective automobile).

50. *E.g.*, *Jay V. Zimmerman Co. v. General Mills, Inc.*, 327 F. Supp. 1198 (E.D. Mo. 1971) (buyer allowed to recover additional transportation costs of shipping cover by air-freight because of shortage of time); *Kohlenberger, Inc. v. Tyson's Foods, Inc.*, 256 Ark. 548, 510 S.W.2d 555 (1974) (absence of allegations in pleadings by buyer as to cover did not preclude recovery as incidental or consequential damages); *Duff v. Bonner Bldg. Supply, Inc.*, 649 P.2d 391 (Idaho Ct. App. 1982) (cost of removing defective paneling and installing replacement paneling); *S.M. Wilson & Co. v. Reeves Red-E-Mix Concrete, Inc.*, 39 Ill. App. 3d 353, 350 N.E.2d 321 (1976) (cost of obtaining additional concrete after seller's refusal to deliver agreed amount).

51. 100 Mich. App. 543, 299 N.W.2d 69 (1980).

52. *Id.* at 545, 299 N.W.2d at 70.

53. *Id.* at 548, 299 N.W.2d at 71.

“reasonable expense incident to the breach.”⁵⁴ Considering the novelty and potentially enormous consequences of its holding, the court’s analysis was unusual. Although the decision was grounded on language contained in section 2-715(1), the court gave no indication that it properly understood what is meant by an incidental damage. The court did not even acknowledge the existence of the American rule.⁵⁵ For its primary support, the court curtly likened the action to one under the Michigan Environmental Protection Act,⁵⁶ which grants discretion to the trial court to award attorney’s fees as costs.⁵⁷

The *Cady* court’s result is defensible even if its reasoning is not. The Michigan Environmental Protection Act represents a public interest field in which the legislature obviously determined that the American rule inhibited the important policy objective of stimulating litigation. For this reason the statute expressly authorizes judicial discretion to apportion costs. While consumer warranty protection is also an area of great public concern, its primary tool of implementation—the U.C.C.—makes no such explicit authorization in section 2-715(1). To the extent the court’s holding is based upon similarities in statutory wording, it is highly questionable.

But the policy underlying the *Cady* decision is clear and commendable: when application of the American rule produces an unfair result, statutory language capable of being interpreted as conferring trial court discretion to skirt the rule should be so construed. The court’s implicit message seems to be that consumer protection is a field as crucial to the public consciousness as environmental protection, and hence plaintiffs asserting wrongs in each field should be treated analogously. The validity of this proposition can hardly be doubted, but the court’s use of section 2-715(1) to invoke a broad discretion unlikely to have been intended by its draftsmen is doubtful indeed.

The *Cady* court based its holding on language contained in the final clause of section 2-715(1): “any other reasonable expense incident to the . . . breach.”⁵⁸ The court apparently considered this clause to be a catch-all provision and thus broad and discretionary in nature. Indeed, the language of the clause as commonly understood might support the court’s interpretation.⁵⁹ The overwhelming weight of authority suggests otherwise.⁶⁰ The

54. *Id.* at 549, 299 N.W.2d at 72 (quoting from Michigan statute identical to U.C.C. § 2-715(1)).

55. The American rule governs in Michigan courts. *Newport West Condominium Ass’n v. Veniar*, 134 Mich. App. 1, 17, 350 N.W.2d 818, 824 (1984); *Fleischer v. Buccilli*, 13 Mich. App. 135, 139, 163 N.W.2d 637, 639 (1968).

56. MICH. COMP. LAWS ANN. § 691.1201-.1207 (West Supp. 1984).

57. *Id.* § 691.1203(3). *See, e.g., Taxpayers & Citizens in the Public Interest v. Department of State Highways*, 70 Mich. App. 385, 245 N.W.2d 761 (1976).

58. U.C.C. § 2-715(1).

59. The word “incident” in this context is defined as “dependent on or appertaining to another thing.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1142 (3d ed. 1981). This definition refers purely to causation. Since the attorney’s fees originated in the seller’s breach, it is not unreasonable to view attorney’s fees as being “incident” to the breach.

60. *See* cases cited *supra* note 11.

illustrative types of incidental damages listed in the statute,⁶¹ while not intended to be definitive, are intended to shed light upon the exact nature of incidental damages. Those items listed are *typical* recoverable expenses. In order to be considered an incidental damage, an expense sought to be recovered must be either one of the expenses listed or so closely related to those listed that it can be considered of the same *type*. As the enumerated expenses demonstrate, incidental damages generally "relate to or directly involve the goods" themselves,⁶² arising within the scope of the immediate buyer-seller transaction.⁶³ Judged by this standard, attorney's fees cannot be considered incidental damages because they do not closely resemble expenses incurred in either handling nonconforming goods or effecting cover. Attorney's fees are usually incurred long after nonconforming goods have been returned and cover has been effected. Although they might be a "reasonable expense incident to the delay or other breach" as that phrase is commonly understood, attorney's fees are in fact one step removed from those expenses normally recovered under section 2-715(1).

Since incidental damages "connote a narrow ambit"⁶⁴ restricted to expenses intimately connected with the seller's breach, section 2-715(1) is not a proper vehicle for allowing the recovery of attorney's fees under the U.C.C. The alternative, section 2-715(2), permits the reimbursement of a multitude of expenses far less closely associated with the seller's breach. If attorney's fees are to be recoverable for successful consumer warranty plaintiffs, absent amendment of the U.C.C., section 2-715(2) must provide the basis for the recovery.

B. Consequential Damages

It is widely agreed that section 2-715(2),⁶⁵ which defines the scope of consequential damages, incorporates the test of reasonable foreseeability

61. U.C.C. § 2-715(1). See *supra* note 46.

62. 4 R. ANDERSON, UNIFORM COMMERCIAL CODE § 2-708:11, at 389 (3d ed. 1981).

63. *Petroleo Brasileiro, S.A., Petrobras v. Ameropan Oil Corp.*, 372 F. Supp. 503, 508 (E.D.N.Y. 1974), *quoted in* *Hofmann v. Stoller*, 320 N.W.2d 786, 792 (N.D. 1982). The *Petroleo* court drew a distinction between, on the one hand, recoverable incidental damages such as transportation, storage, and resale expenses and, on the other, "losses incurred by the non-breaching party in its dealings, often with third parties, which were a proximate result of the breach." *Id.* (emphasis added). The latter are recoverable as consequential damages under U.C.C. § 2-715(2) if reasonably foreseeable at the time of contracting.

64. *McGinnis v. Wentworth Chevrolet Co.*, 295 Or. 494, 502, 668 P.2d 365, 370 (1983).

65. U.C.C. § 2-715(2) provides:

Consequential damages resulting from the seller's breach include

- (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
- (b) injury to person or property proximately resulting from any breach of warranty.

derived from the classic case of *Hadley v. Baxendale*.⁶⁶ An alternative interpretation of *Hadley*, the "tacit agreement" test, was expressly rejected by the U.C.C. draftsmen,⁶⁷ as it had been rejected by courts and scholars prior to promulgation of the U.C.C.⁶⁸ Under section 2-715(2), in order for a buyer to recover consequential damages, he need not prove that he and the buyer specifically contemplated the likelihood of certain damages and that the seller had actually assumed liability for such damages. Instead, the test is objective: "the seller is liable for consequential damages in all cases where he *had reason to know* of the buyer's general or particular requirements at the time of contracting."⁶⁹

The distinction in section 2-715(2) between the buyer's general and particular requirements is noteworthy. This distinction reflects the two basic types of contract damages noted in *Hadley*: (1) those arising naturally from the breach (general requirements), and (2) those due to "special circumstances" surrounding the sale and made known to the seller (particular requirements).⁷⁰

Under section 2-715(2), the seller is normally charged with knowledge of the buyer's general requirements, while particular requirements of the buyer generally must be communicated to the seller.⁷¹ For instance, most courts

66. 9 Ex. 341, 156 Eng. Rep. 145 (1854). See J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 10-4 (1972).

67. U.C.C. § 2-715 comment 2. The "tacit agreement" test allows a buyer to recover damages arising from his "special circumstances" only if the seller "fairly may be supposed to have assumed consciously, or to have warranted [the buyer] reasonably to suppose that it was assumed, [such liability] when the contract was made." *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 544 (1903). Justice Holmes, writing for the Court, further stated that the "mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as a matter of law to charge the seller with special damage on that account if he fails to deliver the goods." *Id.* at 545.

68. The U.C.C. test of reasonable foreseeability was presaged by the *Restatement of Contracts*:

In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made. If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the defendant to foresee it; otherwise, it must be shown specifically that the defendant had reason to know the facts and to foresee the injury.

RESTATEMENT OF CONTRACTS § 330 (1932). See also *Victoria Laundry (Windsor) Ltd. v. Newman Indus. Ltd.*, [1949] 2 K.B. 528; 5 A. CORBIN, CORBIN ON CONTRACTS §§ 1008-12 (1964); 11 S. WILLISTON, WILLISTON ON CONTRACTS § 1357 (3d ed. 1968).

69. U.C.C. § 2-715 comment 3 (emphasis added).

70. Commentators have differed as to whether *Hadley v. Baxendale* distinguishes between two or three classes of contract damages. Compare Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1199-201 (1964) (recognizing the two-test U.C.C. approach) with Case Note, *Uniform Commercial Code— §§ 2-714 & 2-715—Consequential Damages Award— R.I. Lampus Co. v. Neville Cement Products Corp.*, 37 OHIO ST. L.J. 153, 156-57 (1976) (adopting a three-test approach). Any difference between these varying interpretations of *Hadley* would appear, in any event, to be semantic only. Wallach, *The Buyer's Right to Monetary Damages*, 14 U.C.C. L.J. 236, 247-48 (1982).

71. U.C.C. § 2-715 comment 3.

today, especially in the manufacturing context, recognize that lost profits are a natural consequence of a seller's breach of warranty and are recoverable as consequential damages regardless of the seller's knowledge of the buyer's specific needs.⁷² Outside the manufacturing context it may be far less foreseeable that a breach will lead to a loss of profits.⁷³ In these cases, the buyer's special needs must be communicated to the seller. If the buyer's special needs are not acceptable to the seller, the seller may refuse to sell or may contractually limit the buyer's remedy. If the buyer chooses not to accept any limitations of his remedies, he may buy elsewhere.

Attorney's fees must be considered, under any definition, a general requirement of the buyer since they arise inevitably in the ordinary course of events when the seller's warranty is breached and the buyer sues. Despite the self-evident nature of this proposition, attorney's fees have never been considered recoverable consequential damages.⁷⁴ This result stems more from rote invocation of the American rule than from a realistic interpretation of section 2-715(2). No single item of damage in a breach of warranty suit is more likely to be incurred or likely to be more significant than the expense of employing an attorney. At one time many years ago it may not have been foreseeable or necessary for an injured party to retain a lawyer to seek recompense.⁷⁵ Today, the complexity of the legal machinery absolutely requires that an injured party hire an attorney;⁷⁶ no seller can express surprise upon learning that a buyer has hired an attorney to bring a breach of warranty action.⁷⁷ The only factor preventing the foreseeability of attorney's

72. Lost profits are "the most commonly litigated and doubtless the most often sought after item of consequential damages." J. WHITE & R. SUMMERS, *supra* note 66, § 10-4, at 319. The most important lost profits case in the manufacturing context is *Lewis v. Mobil Oil Corp.*, 438 F.2d 500 (8th Cir. 1971). Lost profits must be established with reasonable certainty. *E.g.*, *Valley Die Cast Corp. v. A.C.W., Inc.*, 25 Mich. App. 321, 181 N.W.2d 303 (1970).

73. *English Whipple Sailyard, Ltd. v. The Yawl Ardent*, 459 F. Supp. 866, 877 (W.D. Pa. 1978) (buyer's desire to charter boat unknown to seller).

74. See cases cited *supra* note 11.

75. See *supra* note 38.

76. See *Stirling*, *supra* note 20, at 878:

[E]ven the most simple legal matter cannot be effectuated without at least consulting an attorney. The mechanics and procedures of the administration of justice have become so complex that the layman is practically forced to seek the advice of counsel in matters which were once somewhat within his ability to comprehend. Particularly is this true in the more heavily populated and rapidly growing areas of the state and country.

77. An illustration might prove useful. *B* wishes to buy a microwave oven, and finds one he likes at *S*'s store. *B*, an especially cautious consumer, tells *S*: "I would like to buy this microwave oven, but of course I am worried about its quality. If I have trouble with it and am not satisfied with your attempts at repair, I assure you I will hire a lawyer, bring suit, and expect you to pay my attorney's fees if I win. Agreed?" *S*, confident in the quality of his product, agrees. If *B* sues and wins, presumably *S* will be liable for *B*'s attorney's fees. This result is dictated not only by the particular requirements rule of U.C.C. § 2-715(2), but also by the provision of the American rule that attorney's fees are recoverable when called for

fees in consumer breach of warranty actions is the *in terrorem* effect of the American rule. The same rule that initially deters the assertion of the claim may ironically limit the recovery of a consumer who does successfully bring a claim.⁷⁸

Attorney's fees appear to be sufficiently foreseeable to be recoverable as consequential damages under section 2-715(2). The American practice prohibiting fee-shifting, however, summarily precludes such recovery. A court which violates the American rule and allows attorney's fees under the U.C.C. invites admonition, as the *Cady* decision demonstrates.⁷⁹ Section 2-715 could simply be amended to expressly authorize the recovery of attorney's fees to consumers successful in breach of warranty actions. Amending section 2-715 would preserve the integrity of the American rule while furthering the policies discussed previously.⁸⁰ Amendment of the U.C.C., although uncommon, is not unheard of.⁸¹ It may, in any event, be unnecessary. An increasing amount of consumer warranty legislation achieves much the same result without altering the U.C.C. In light of this trend, amendment of the U.C.C.

contractually.

The contractual nature of the understanding between buyer and seller in this hypothetical is apparent. The crucial issue, however, is whether the buyer must inform the seller that, in the event of a breach of warranty, the buyer will bring suit and hire an attorney who must be paid. Section 2-715(2) does not require that the seller consciously accept liability for certain expenses, as the seller did in the hypothetical. Instead, the seller is liable for all reasonably foreseeable expenses. Attorney's fees are plainly foreseeable in a breach of warranty suit.

78. Judge Posner of the Seventh Circuit has recently concluded that there is more to *Hadley* than the rule of reasonable foreseeability. In *EVRA Corp. v. Swiss Bank Corp.*, 673 F.2d 951 (7th Cir. 1982), the plaintiff suffered a loss of profits due to the defendant bank's failure to transfer funds when instructed by wire to do so. Posner, writing for the court, used *Hadley* to limit the plaintiff's recovery. Posner examined *Hadley* and found it to be merely a specific application of the principle that "the costs of the untoward consequence of a course of dealings should be borne by that party who was able to avert the consequence at least cost and failed to do so." *Id.* at 957. Posner found that the plaintiff in *EVRA* was the least costly risk avoider and denied recovery for loss of profits.

This economic approach to *Hadley* cannot be applied to deny the recovery of attorney's fees to consumers successful in breach of warranty actions. Under *EVRA*, the preventive measures available to both parties are analyzed and balanced at the time the breach occurred. *See id.* at 957-59. A consumer aggrieved by a breach of warranty cannot take precautions to prevent the expense of attorney's fees, short of the economically undesirable action of forgoing the claim entirely. On the other hand, if it were well-established that prevailing consumers could recover attorney's fees in warranty actions, the manufacturer would be aware of this potential loss and would have incentive to avoid similar expenses in the future. In any event, regardless of which party can most efficiently avoid the risk of paying an attorney, Posner has previously stated that allowing attorney's fees to prevailing litigants generally is economically efficient in that it encourages settlements. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 350-51 (1972); *see supra* note 34.

79. *See supra* text accompanying notes 51-60.

80. *See supra* notes 29-36 and accompanying text.

81. Section 2-316, for example, has been a frequent subject of state variation. *See* ALA. CODE § 7-2-316 (1984); MD. COM. LAW CODE ANN. § 2-316 (1975); MASS. GEN. LAWS ANN. ch. 106, § 2-316 (West 1984). Mississippi did not enact § 2-316 or an equivalent section.

may be superfluous. That determination necessarily depends upon the scope and effectiveness of this new legislation.

III. CONSUMER WARRANTY LEGISLATION

Although the American rule ordinarily bars an award of attorney's fees under the U.C.C., plaintiffs today recover these expenses occasionally when successful in warranty actions. Legislators at both the state and federal levels have recognized that the U.C.C. was written for merchants, not for consumers. The U.C.C. is founded in large part upon the principle of freedom of contract and governs effectively transactions between parties of equal bargaining power.⁸² It provides precious little protection, however, for a consumer who has little power to influence the terms of the sale.⁸³ In an effort to enhance consumer leverage, a considerable body of legislation designed to beef up the U.C.C. has arisen recently. This wave of consumer legislation has essentially two objectives. The first goal is to increase the quality of products sold in the market, ideally through warranty competition among manufacturers. The second goal is to afford consumers better remedies. In particular, much of this legislation expressly awards attorney's fees to successful consumer plaintiffs.

A. *The Magnuson-Moss Warranty Act*

The most significant legislative enlargement of U.C.C. remedies is undoubtedly provided by the Magnuson-Moss Warranty Act.⁸⁴ Passed by Congress in 1975, the Magnuson-Moss Act is the first federal statute dealing with the law of warranty.⁸⁵ It provides a federal cause of action for consumers

82. U.C.C. § 1-102 comment 2. See also Bunn, *Freedom of Contract Under the Uniform Commercial Code*, 2 B.C. INDUS. & COM. L. REV. 59 (1960).

83. See generally Whitford, *Law and the Consumer Transaction: A Case Study of the Automobile Warranty*, 1968 WIS. L. REV. 1006.

84. 15 U.S.C. §§ 2301-12 (1982). The entire name of the statute is the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, originally enacted as Act of Jan. 4, 1975, Pub. L. No. 93-637, §§ 101-12, 88 Stat. 2183.

85. The Act drew considerable attention in the literature immediately after its passage. See generally C. REITZ, *CONSUMER PROTECTION UNDER THE MAGNUSON-MOSS WARRANTY ACT* (1978); Brickey, *The Magnuson-Moss Act—An Analysis of the Efficacy of Federal Warranty Regulation as a Consumer Protection Tool*, 18 SANTA CLARA L. REV. 73 (1978); Clark & Davis, *Beefing Up Product Warranties: A New Dimension in Consumer Protection*, 23 U. KAN. L. REV. 567 (1975); Denicola, *The Magnuson-Moss Act: Making Consumer Product Warranty a Federal Case*, 55 FORDHAM L. REV. 273 (1975); Eddy, *Effects of the Magnuson-Moss Act Upon Consumer Product Warranties*, 55 N.C.L. REV. 835 (1977); Hey, *The Magnuson-Moss Act and the Uniform Commercial Code: A Survey of Warranty Protection in Consumer Sales Transactions*, 2 U. DAYTON L. REV. 233 (1977); Leete, *A Look at the Consumer Warranty Problem—The Federal Solution*, 6 U. TOL. L. REV. 351 (1975); Magnuson, *Fair Disclosure in the Marketplace of Warranty Promises—Truth in Warranties for Consumers*, 8 U.C.C. L.J. 117

who encounter problems with warranted durable goods.⁸⁶ If the plaintiff prevails in an action against the seller, the plaintiff is entitled to recover all litigation expenses, including attorney's fees based on actual time expended, unless the court determines an award of attorney's fees to be inappropriate under the circumstances.⁸⁷

The Magnuson-Moss Act's bold attorney's fees provision evinces clear dissatisfaction with the effect of the American rule in a field in which consumers need incentive to enforce their rights.⁸⁸ Despite this invitation to consumer litigation, however, the Act has not revolutionized warranty law in the manner envisioned by Congress. Although it has proven helpful, the Act is no panacea. Not every wronged consumer is entitled to attorney's fees under the Act. In addition to the court's discretion to deny such an award,⁸⁹ the right to claim fees is subject to both substantive and procedural limitations. The issue is whether the Act sufficiently improves U.C.C. remedies to render unnecessary the allowance of attorney's fees under the U.C.C. as a means of improving consumer bargaining power. In order to understand the Act's limitations, its history and major provisions must be briefly set forth.

The stated purposes of the Magnuson-Moss Warranty Act are to "improve the adequacy of information available to consumers, prevent deception, and

(1975); Rothschild, *The Magnuson-Moss Warranty Act: Does It Balance Warrantor and Consumer Interests?*, 44 GEO. WASH. L. REV. 335 (1976); Saxe & Blejwas, *The Federal Warranty Act: Progress and Pitfalls*, 22 N.Y.L. SCH. L. REV. 1 (1976); Schmitt & Kovac, *Magnuson-Moss vs. State Protective Consumer Legislation: The Validity of a Stricter State Standard of Warranty Protection*, 30 ARK. L. REV. 21 (1976); Schroeder, *Private Actions Under the Magnuson-Moss Warranty Act*, 66 CALIF. L. REV. 1 (1978); Smith, *The Magnuson-Moss Warranty Act: Turning the Tables on Caveat Emptor*, 13 CAL. W.L. REV. 391 (1977); Strasser, *Magnuson-Moss Warranty Act: An Overview and Comparison with UCC Coverage, Disclaimer, and Remedies in Consumer Warranties*, 27 MERCER L. REV. 1111 (1976); Note, *Consumer Product Warranties Under the Magnuson-Moss Warranty Act and the Uniform Commercial Code*, 62 CORNELL L. REV. 738 (1977); Note, *The Magnuson-Moss Warranty Act: Consumer Information and Warranty Regulation*, 51 IND. L.J. 397 (1976); Comment, *The Federal Consumer Warranty Act and Its Effect on State Law*, 43 TENN. L. REV. 429 (1976).

For later discussions of cases arising under the Act, see Bixby, *Judicial Interpretation of the Magnuson-Moss Warranty Act*, 22 AM. BUS. L.J. 125 (1984); Miller & Kanter, *Litigation Under Magnuson-Moss: New Opportunities in Private Actions*, 13 U.C.C. L.J. 10 (1980).

86. 15 U.S.C. § 2310(d)(1) (1982). The Act creates four separate causes of action: (1) the failure of a supplier, warrantor, or service contractor to comply with any obligation under the Act; (2) breach of written warranty; (3) breach of implied warranty; and (4) breach of service contract.

87. *Id.* § 2310(d)(2). See, e.g., *Dunlap v. Jimmy GMC of Tucson, Inc.*, No. 179060 (Pima County Super. Ct. May 29, 1981), *aff'd*, 136 Ariz. 338, 666 P.2d 83 (1983) (awarding \$20,500 in attorney's fees); *Black v. Don Schmid Motors, Inc.*, 232 Kan. 458, 657 P.2d 517 (1983) (\$3,000); *Royal Lincoln-Mercury Sales, Inc. v. Wallace*, 415 So. 2d 1024 (Miss. 1982) (\$2,162.50).

88. Bixby, *supra* note 85, at 154-55.

89. See *Hanks v. Pandolfo*, 38 Conn. Supp. 447, 450 A.2d 1167 (1982); *Trost v. Porreco Motors, Inc.*, 443 A.2d 1179 (Pa. Super. 1982); see also *Peterson v. Bendix Home Systems, Inc.*, 318 N.W.2d 50 (Minn. 1982) (plaintiff's post-trial motion for attorney's fees untimely).

improve competition in the marketing of consumer products."⁹⁰ Although these three purposes are intimately connected,⁹¹ the second one was clearly the driving force behind the Act's inception and passage. Congress' main concern was with the confusing, often incomprehensible language of product warranties.⁹² The Act consequently does not so much regulate the substantive content of the transaction as it seeks to aid consumer comprehension of the transaction.⁹³ In fact, in many ways the substantive warranty requirements of the Act add very little to those of the U.C.C.

The Act is essentially concerned with the regulation of written express warranties given in connection with "consumer products" made available by "suppliers."⁹⁴ The Act does not require a seller to provide a written warranty on any product.⁹⁵ If a written warranty is offered, however, it must meet certain statutory disclosure requirements.⁹⁶ Written warranties

90. 15 U.S.C. § 2302(a) (1982).

91. Professor Reitz has neatly tied together the reasoning behind the Act:

(1) Better informed consumers will make better judgments about how to spend their dollars; (2) if consumers have greater advance knowledge about the warranties that accompany goods, they will select those products that have stronger warranties; (3) as warranty terms begin to affect marketability of goods, manufacturers and sellers will be induced to compete on warranty terms; (4) this will provide better warranty protection to consumers; (5) it could also lead to improvements in the quality of the products, since strong warranties will not accompany weak goods.

C. REITZ, *supra* note 85, at 23 (emphasis deleted).

92. See generally H.R. REP. NO. 1107, 93d Cong., 2d Sess. 20 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7702. As the court stated in *Skelton v. General Motors Corp.*, 660 F.2d 311, 313-14 (7th Cir. 1981), *cert. denied*, 456 U.S. 974 (1982): "Magnuson-Moss is, in the main, a remedial statute designed to protect consumers from deceptive warranty practices. Its draftsmen believed that consumer product warranties often were too complex to be understood, too varied to allow meaningful comparisons and too restricted to provide meaningful warranty protection."

93. See Schroeder, *supra* note 85, at 1.

94. A "consumer product" is defined in 15 U.S.C. § 2301(1) (1982) as "any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed)." Whether a particular item is a "consumer product" under the Act depends upon the actual use of the product purchased by the consumer. *Balsler v. Cessna Aircraft Co.*, 512 F. Supp. 1217 (N.D. Ga. 1981) (factual resolution required as to whether aircraft was normally used for personal, family, or household purposes). Products which are not commonly used for consumer purposes do not become "consumer products" merely because they are occasionally used for personal or household purposes. *Crume v. Ford Motor Co.*, 60 Or. App. 224, 653 P.2d 564 (1982) (flatbed truck occasionally used by buyer to transport groceries when buyer went to town on business not a "consumer product").

A "supplier" is defined in 15 U.S.C. § 2301(4) (1982) as "any person engaged in the business of making a consumer product directly or indirectly available to consumers."

95. 15 U.S.C. § 2302(b)(2) (1982).

96. The Act in §§ 2302(a) and 2302(b) authorizes the Federal Trade Commission to promulgate rules and regulations governing warranty information disclosure. Matters subject to mandatory disclosure are listed at 16 C.F.R. § 701.3 (1985).

must be labelled as either "full" or "limited" warranties.⁹⁷ A full warranty normally implies greater protection for the consumer than a limited warranty.⁹⁸ Although the Act creates no implied warranties not already existent under state law,⁹⁹ it does provide that a seller offering any written warranty may not disclaim any implied warranty.¹⁰⁰

At least three substantive provisions of the Magnuson-Moss Act can operate to provide less protection to the consumer than the U.C.C. Under these provisions, the consumer's right to attorney's fees is in some way restricted, either by conditioning his cause of action or precluding it altogether. The consumer in these circumstances may be forced instead to bring his action under the U.C.C. and pay his own attorney's fees.

The first restriction on the right to recover attorney's fees is made express by the statute. Before the consumer-plaintiff may initiate a lawsuit under the Act, the seller must be given an opportunity to cure.¹⁰¹ The U.C.C. contains no parallel provision. Although U.C.C. section 2-508(1) authorizes sellers to cure defective tenders while time remains for performance,¹⁰² it in no way conditions the buyer's right to institute legal proceedings. The opportunity to cure required by the Act can be seen as a compromise between the consumer's right to recover attorney's fees and the refusal to permit disclaimers of implied warranties.¹⁰³ This requirement is not, of course, fatal to the consumer's cause of action, but it can prove troublesome. Although most consumers ordinarily would prefer a satisfactory cure to an action for damages, most would ordinarily prefer a properly functioning new product to a repaired product.¹⁰⁴ After all, despite claims to the contrary by manufacturers, it is not clear that every new product can always be wholly fixed.¹⁰⁵ If the repaired product proves unsatisfactory to the consumer but his warranty action fails, the Act will have deprived the consumer of his

97. 15 U.S.C. § 2303 (1982).

98. See C. REITZ, *supra* note 85, at 46-61.

99. 15 U.S.C. § 2301(7) (1982).

100. *Id.* § 2308(a); see C. REITZ, *supra* note 85, at 63-71.

101. 15 U.S.C. § 2310(e) (1982).

102. U.C.C. § 2-508(1) provides: "Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery."

103. See Comment, *The Federal Consumer Warranty Act and Its Effect on State Law*, 43 TENN. L. REV. 429, 444 n.77 (1976).

104. In *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J. Super. 441, 240 A.2d 195 (1968), a case concerning a new car with a defective transmission, the court noted that every new car buyer has a right to assume and, indeed, has been led to assume by the high powered advertising techniques of the auto industry—that his new car, with the exception of very minor adjustments, would be mechanically new and factory-finished, operate perfectly, and be free of substantial defects.

Id. at 452, 240 A.2d at 202.

105. See Nat'l L.J., July 4, 1983, at 40, col. 4.

earlier legal action, and he will now as the losing party be forced to pay his own attorney's fees. Even if the consumer prevails in this action, his recovery will have been postponed due to the opportunity to cure requirement.

Two other substantive provisions of the Act can potentially restrict the consumer's right to recover his attorney's fees.¹⁰⁶ First, a written limited warranty under the Act may limit the duration of the implied warranty of merchantability to that of the written warranty, if the limitation is conscionable and set forth plainly on the face of the warranty.¹⁰⁷ Section 2-725(1) of the U.C.C., on the other hand, prohibits the parties from shortening the period of limitation of an implied warranty to less than one year.¹⁰⁸ A written warranty which is limited to less than one year apparently may under the Act, but clearly not under the U.C.C., contain language limiting the implied warranty to the same duration.¹⁰⁹ Professor Reitz, noting this difficulty, has voiced skepticism that the courts would accept such an interpretation of the Act.¹¹⁰ Nevertheless, he recommends congressional reconsideration of this provision,¹¹¹ which no reported cases as yet have had occasion to construe.

Second, a full warrantor under the Act may exclude or limit consequential damages for breach of any written or implied warranty, if such limitation or exclusion appears conspicuously on the face of the warranty.¹¹² To the extent the Act permits a manufacturer to disclaim responsibility for personal injury resulting from a defective product, it is directly contrary to U.C.C. section 2-719(3), which make limitation of such damages *prima facie* unconscionable.¹¹³ It seems highly improbable that the Act was intended to permit such a result, although again there are no reported cases dealing with the question. It is more likely that the Act uses the term "consequential damages" to mean economic loss and not personal injury.¹¹⁴ Even if this is so, the consumer's remedy for personal injury caused by the warranted defective product lies in a products liability suit, and the plaintiff is responsible for his own attorney's fees. Courts directly addressing the issue have held that personal injury claims arising from breach of warranty are not cognizable under the Act.¹¹⁵

106. Clark & Davis, *supra* note 85, at 611-12.

107. 15 U.S.C. § 2308(b) (1982).

108. U.C.C. § 2-725(1).

109. Clark & Davis, *supra* note 85, at 611.

110. C. REITZ, *supra* note 85, at 69-71.

111. *Id.*

112. 15 U.S.C. § 2304(a)(3) (1982).

113. U.C.C. § 2-719(3).

114. Clark & Davis, *supra* note 85, at 611-12.

115. *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058 (5th Cir. 1984); *Bush v. American Motors Sales Corp.*, 575 F. Supp. 1581 (D. Colo. 1984); *Gorman v. Saf-T-Mate, Inc.*, 513 F. Supp. 1028 (N.D. Ind. 1981).

Congress has also given the consumer a procedural roadblock under the Act. Warrantors have been expressly encouraged by Congress to establish informal dispute settlement mechanisms ("IDSMS") to mediate consumer warranty disputes.¹¹⁶ If a warrantor establishes an IDSM which meets Federal Trade Commission ("FTC") standards, the warrantor may, in a written warranty, condition the pursuit of any legal remedy upon resort to the IDSM.¹¹⁷ This provision by itself is not unreasonable. The desirability of having available an efficient, low-cost procedure for settling consumer disputes is evident. These mechanisms can facilitate compromises, decrease court congestion, and save both disputants the potential costs of litigation. Moreover, Congress and the FTC have provided that an IDSM may not be used unfairly as merely another impediment to legal redress.¹¹⁸

The practical problem facing a consumer required to utilize an IDSM does not arise when the mechanism fails to settle the dispute. If the dispute is not resolved, the IDSM renders a nonbinding decision including all remedies proper under the circumstances. The consumer may still proceed with litigation under the Act.¹¹⁹ The practical problem posed by the IDSM provision arises when a settlement is actually reached. In such a case, it is not clear that the consumer is able to recover his attorney's fees incurred in presenting his case before the IDSM.¹²⁰ The statute and regulations are silent on this point. Once again, no reported case has considered the question, presumably because so far relatively few sellers have accepted Congress' invitation to create IDSM's.¹²¹ The regulations state that the decision of the IDSM shall include "any remedies appropriate under the circumstances, including repair, replacement, refund, reimbursement for expenses, compensation for damages, and any other remedies available under the written warranty or the

116. 15 U.S.C. § 2310(a)(1) (1982) states: "Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms."

117. *Id.* § 2310(a)(3). The FTC has established fairly elaborate minimum requirements for IDSM's. 16 C.F.R. § 703 (1985). For an in-depth analysis of the operation of IDSM's, see Rothschild, *supra* note 85, at 368-77.

118. Section 2310(a)(4) provides that the FTC may on its own initiative review the operation of any IDSM. 15 U.S.C. § 2310(a)(4) (1982). If the FTC finds that a particular IDSM does not comply with FTC rules, the FTC may "take appropriate remedial action under any authority it may have under this chapter or any other provision of law." *Id.*

119. The decision of the IDSM is admissible in evidence in the latter action. *Id.* § 2310(a)(3). Although some practitioners see this as a great drawback to the IDSM provision, Nat'l L.J., July 4, 1983, at 42, col. 3, this reaction is probably overstated. Case law concerning IDSM's is still remarkably scant, however, and does not shed light on the matter.

120. See C. REITZ, *supra* note 85, at 91-92.

121. One of the few cases thus far discussing IDSM's is *Kravitz v. Homeowners Warranty Corp.*, 542 F. Supp. 317 (E.D. Pa. 1982). In that case, the plaintiff sought judicial review of an IDSM established by the defendant. The court held that mere variance from FTC minimum requirements does not render the IDSM in violation of the Act when the IDSM in question is fair and clearly favors the consumer protection policies of the Act.

Act (or rules thereunder).'¹²² Under this language, the IDSM apparently could make an allowance for attorney's fees. If it does not make such an allowance, however, the consumer may be compelled to accept an award that provides for less than full compensation rather than risk litigation attempting to recover full compensation. Denying the recovery of attorney's fees incurred in the course of the settlement procedure would be contrary to the policies of the Act.

Under several circumstances, therefore, the Magnuson-Moss Act can provide relief to the aggrieved consumer no greater than that of the U.C.C. Yet the consumer's greatest hurdle to full redress under the Act lies not in its substantive deficiencies or its procedural devices, but in the pioneering nature of its attorney's fees provision. For a myriad of reasons, attorneys have historically had a strong distaste for consumer claims¹²³ and were slow to become aware of the ramifications of Magnuson-Moss. Attorneys remained skeptical even after the potential for consumer litigation under the Act became apparent. Since the Act left the award of attorney's fees to the discretion of the court, many attorneys doubted that courts stubbornly accustomed to the American rule would actually award fees commensurate with the time expended when the recovery itself was modest.¹²⁴ Until at least the early 1980's, therefore, Magnuson-Moss was largely ignored and only infrequently invoked. This fact is clearly demonstrated by the scarcity of case law concerning the Act.

In the past several years, however, plaintiffs' attorneys have finally discovered the Act and have begun to make use of its attorney's fees provision. Consumer warranty claims have increased steadily in number since the passage of the Act and are not expected to decline in the foreseeable future.¹²⁵ Use of the fee-shifting provisions of the Act has proved advantageous in conjunction with the substantive warranty provisions of the U.C.C. In *Champion Ford Sales v. Levine*,¹²⁶ a Maryland couple purchased a new 1978 Ford Granada from the defendant dealer. After the car had been driven 109 miles, a defective engine valve broke off and fell into a cylinder, causing considerable damage. The buyers decided they did not want a shop-rebuilt engine, and demanded either a new car or a new engine. The dealer refused. The buyer prevailed in an action to revoke acceptance under U.C.C. section 2-

122. 16 C.F.R. § 703.5(d)(1) (1985).

123. See Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115, 120-43 (1979).

124. In 1977, an informal study conducted by the FTC's Bureau of Consumer Protection confirmed that attorneys were indeed suspicious of the discretionary nature of fee recovery under the Act and favored settlement over litigation. STAFF OF HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 96TH CONG., 1ST SESS., AUTOMOBILE REPAIRS: AVOIDABLE COSTS 34 (Comm. Print 1979).

125. Nat'l L.J., July 4, 1983, at 1, col. 1.

126. 49 Md. App. 547, 433 A.2d 1218 (1981).

608 and sought attorney's fees under the Act. The Maryland Court of Special Appeals held that the buyers had satisfied the requirements of the Act and remanded the case to the trial court for a determination of an appropriate award.¹²⁷

The U.C.C.-Magnuson-Moss hookup exemplified by *Levine* is plainly of great benefit to consumers aggrieved by a breach of warranty. This benefit will not be available to all such consumers, however. The buyers in *Levine* were entitled to attorney's fees because they prevailed in an action for breach of implied warranty under the U.C.C.¹²⁸ and afforded the seller an opportunity to cure. Not every consumer who can allege a breach of warranty under the U.C.C. can utilize Magnuson-Moss. As discussed previously, many attorneys were still largely unaware of the Act and will not have the foresight to advise consumer-clients to allow the dealer to cure in order to allow recovery of attorney's fees, especially since the U.C.C., the warranty statute most familiar to lawyers, does not require that an opportunity to cure be given. Also, it is apparent in *Levine* that the manufacturer had not established an IDSM. In similar situations when the manufacturer has an IDSM in place, the mechanism may ultimately resolve the dispute, but the consumer apparently will be forced to bear his own attorney's fees. Such a consumer will be reluctant to bring the claim in the first place, and the access-enhancing policies of the Act will be of no avail.

B. State Legislation

The Magnuson-Moss Warranty Act is not the only legislative response to the unfortunate effect of the American rule in the consumer warranty field. While the majority of states still rely on the provisions of the U.C.C. to govern this field, others have taken steps to discard the U.C.C.'s restrictive remedies. Numerous states have recently enacted laws which, in varying degrees, complement U.C.C. remedies by expressly awarding attorney's fees to certain successful consumer-plaintiffs.¹²⁹ Viewed in conjunction with Magnuson-Moss, this state legislation broadens further the opportunity for consumers to spurn the U.C.C. and seek the protection of warranty statutes that represent more sympathetically their interests. Nearly all of these statutes are limited in scope, however, and most states have not yet enacted such legislation. The question again is whether the existence of state consumer

127. *Id.* at 562-63, 433 A.2d at 1226-27.

128. *Id.* at 563, 433 A.2d at 1227.

129. *See supra* notes 130-33 & 138. A very few states have gone even farther by enacting broadly applicable fee-shifting statutes which apply not only to consumer suits but also to a wide variety of actions. In Alaska, attorney's fees generally are included in taxable costs. ALASKA STAT. § 09.60.010 (1983). Nevada courts are authorized to award attorney's fees when the recovery is less than \$10,000. NEV. REV. STAT. § 18.010(2) (1979).

warranty legislation obviates the need to allow the recovery of attorney's fees under section 2-715 of the U.C.C.

A very small number of states allow attorney's fees to be recovered by consumer-plaintiffs who successfully assert the breach of any express or implied warranty. California,¹³⁰ Maryland,¹³¹ and Oregon¹³² exemplify this approach. The practical effect of such a provision is identical to allowing the recovery of attorney's fees as an incidental or consequential damage under U.C.C. section 2-715 in consumer warranty actions. In these states, consumers' access to the courts remains uniformly unhampered regardless of the purchase price of the product that is the subject of the dispute.¹³³

The most common state approach has been to limit the recovery of attorney's fees to warranty actions involving certain products only. State legislatures recently have shown particular interest in the field of new automobile warranties.¹³⁴ This legislative concern has resulted in a literal explosion of so-called "lemon laws" around the country.¹³⁵ At least twenty-three state lemon laws have sprung up in the last four years, beginning with Connecticut's in 1982.¹³⁶ These statutes typically require automobile dealers and manufacturers to replace an automobile or refund its purchase price, minus an allowance for the consumer's use of it, if any defect which substantially impairs the value of the automobile to the consumer is not repaired after a reasonable number of attempts.¹³⁷ Roughly half of the lemon laws

130. CAL. CIV. CODE § 1794(d) (West Supp. 1985).

131. MD. COM. LAW CODE ANN. § 14-407(c)(2) (1983).

132. OR. REV. STAT. § 20.098 (1983).

133. Oklahoma takes an intermediate position, allowing the recovery of attorney's fees in actions for breach of express warranty only. Consumers successful in an action for breach of implied warranty may not recover their attorney's fees. OKLA. STAT. ANN. tit. 12, § 939 (West Supp. 1984). The same result obtains in Minnesota through judicial construction of the Minnesota Consumer Protection Act, MINN. STAT. ANN. § 325G.01-.35 (West 1982). *Jacobs v. Rosemount Dodge-Winnebago South*, 310 N.W.2d 71 (Minn. 1981).

134. See generally Rigg, *Lemon Laws Should be Written to Ensure Broad Scope and Adequate Remedies*, 17 CLEARINGHOUSE REV. 302 (1983); *Minnesota Developments—A Sour Note: A Look at the Minnesota Lemon Law*, 68 MINN. L. REV. 846 (1984).

135. Nat'l L.J., July 4, 1983, at 1, col. 1.

136. ARIZ. REV. STAT. ANN. §§ 44-1261 to -1265 (Supp. 1984); CONN. GEN. STAT. ANN. § 42-179 (West Supp. 1984); DEL. CODE ANN. tit. 6, §§ 5001-5009 (Supp. 1984); FLA. STAT. ANN. § 681.10-.108 (West Supp. 1984); ILL. ANN. STAT. ch. 121 1/2, §§ 1201-1228 (Smith-Hurd Supp. 1985); ME. REV. STAT. ANN. tit. 10, §§ 1474-1477 (Supp. 1984); MASS. ANN. LAWS ch. 90, § 7N 1/2, (Michie/Law. Co-op. 1985); MINN. STAT. ANN. § 325F.665 (West Supp. 1984); MO. ANN. STAT. § 407.560-.579 (Vernon Supp. 1985); MONT. CODE ANN. §§ 61-4-501 to -507 (1983); NEB. REV. STAT. §§ 60-2701 to -2709 (1984); 1983 Nev. Stat. 610; N.H. REV. STAT. ANN. §§ 357-D:1 to -D:8 (1984); N.J. STAT. ANN. §§ 56:12-19 to 12-28 (West Supp. 1984); N.Y. GEN. BUS. LAW § 198-a (Consol. Supp. 1984); OR. REV. STAT. § 646.315-.375 (1983); R.I. GEN. LAWS §§ 31-5.2-1 to -13 (Supp. 1984); TENN. CODE ANN. §§ 55-24-101 to -109 (Supp. 1984); TEX. REV. CIV. STAT. ANN. art. 4413(36) § 6.07 (Vernon Supp. 1986); VA. CODE §§ 59.1-207.9 to -207.14 (Supp. 1984); WASH. REV. CODE ANN. § 19.118.010-.070 (Supp. 1985); WIS. STAT. ANN. § 218.015 (West Supp. 1984); WYO. STAT. § 40-17-101 (Supp. 1983).

137. The New York lemon law is typical. A presumption that a reasonable number of attempts

provide for attorney's fees.¹³⁸ These laws are great boons to consumers, especially those laws authorizing attorney's fees. Their restriction to automobile warranties, however, limits their value to consumers, who usually own numerous other expensive warranted products which have not been accorded special statutory status.

To an even lesser extent than the Magnuson-Moss Act, state consumer warranty legislation has not entirely solved the problem of providing full redress to consumers successful in breach of warranty actions. The state response has been peculiarly restrained. Consumers in the vast majority of states may not, under state law, recover their attorney's fees in warranty actions, unless the suit concerns an automobile and is brought in one of the handful of states providing for attorney's fees in lemon law actions.¹³⁹ Automobile warranties are perhaps the most common subjects of warranty disputes. Automobiles are expensive and a great deal is at stake when they are plagued with defects. But other consumer products, such as boats and home electronic equipment, can be equally expensive, and other less expensive warranted products break down also. Consumers having warranty problems with several products deserve to be made whole with respect to each product, not only their automobiles.

CONCLUSION

The Magnuson-Moss Warranty Act was designed by Congress to complement state warranty law, primarily the U.C.C. Perhaps it is time state warranty law was redesigned to buttress Magnuson-Moss. To a minor extent, that process has already begun with the passage of "lemon laws" and other warranty statutes awarding attorney's fees. The most fundamental reservoir

to repair have been made is raised when the defect is not fixed after four attempts within the first 18,000 miles or within two years of delivery, or when the automobile is out of service for repairs for 30 days during either period. N.Y. GEN. BUS. LAW § 198-a(d) (Consol. Supp. 1984).

138. The lemon laws of Connecticut, Florida, Maine, Massachusetts, Minnesota, Missouri, Nebraska, New York, Rhode Island, Tennessee, and Wisconsin all allow attorney's fees. See statutes cited *supra* note 136. For example, CONN. GEN. STAT. ANN. § 42-180 (West Supp. 1984) provides:

In any action by a consumer against the manufacturer of a motor vehicle, or the manufacturer's agent or authorized dealer, based upon the alleged breach of an express or implied warranty made in connection with the sale of such motor vehicle, the court, in its discretion, may award to the plaintiff his costs and reasonable attorney's fees or, if the court determines that the action was brought without any substantial justification, may award costs and reasonable attorney's fees to the defendant.

139. It is conceivable that the legislatures in those states not awarding attorney's fees to successful lemon law plaintiffs refused to permit such an award because they deemed Magnuson-Moss' attorney's fees provision to be sufficient. If so, their view of Magnuson-Moss would appear to be overly optimistic. Many of these lemon laws were considered before the Act began to be used with any frequency.

of warranty protection, the U.C.C., has remained inexplicably inviolate. Section 2-715 of the U.C.C. contains language capable of authorizing the recovery of attorney's fees. The sole bar to permitting such a reading of section 2-715 is the American rule, an anachronism endorsed solely to those bound by *stare decisis*, whose asserted justifications do not extend to the field of consumer warranty protection.

Either through reinterpretation or amendment, if necessary, the U.C.C. should allow the recovery of attorney's fees by consumers. Neither the Magnuson-Moss Act nor state consumer warranty legislation has yet increased consumer bargaining power enough to force manufacturers into improving both products and warranties. Until such an increase takes shape, another fees provision should be placed where its impact will be the greatest—in the U.C.C.

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