

# Implied Warranty and the Used Car Rule

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## IMPLIED WARRANTY AND THE USED CAR RULE

Acting pursuant to a Congressional grant of power to prescribe "interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce,"<sup>1</sup> the Federal Trade Commission (the Commission) adopted the Used Car Rule (the Rule) regulating the sale of used motor vehicles.<sup>2</sup> The Rule requires all dealers to affix a "Buyer's Guide" window disclosure label on used vehicles offered for sale to consumers.<sup>3</sup> Designed to prevent and discourage oral misrepresentations and unfair omissions of material facts by used car dealers, the "Buyer's Guide" contains essentially four elements:

1. A disclosure of whether the vehicle is offered for sale "as is" or with a written or express warranty, and, if the latter, the coverage and duration of the warranty;<sup>4</sup>

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1. 15 U.S.C. § 57a(a)(1)(A) (1982).

2. 16 C.F.R. § 455 (1986). In May 1982 Congress vetoed a prior regulation, 16 C.F.R. § 455 (1982). Nevertheless, the legislative veto provision in Section 21 of the F.T.C. Improvements Act of 1980 was held unconstitutional by the United States Supreme Court in *Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216, 103 S. Ct. 3556 (1983). This decision invalidated the Congressional veto of the rule. See Hersbergen, *Developments in the Law, 1980-1981—Consumer Protection*, 42 La. L. Rev. 513 (1982).

3. See Buyer's Guide (attached), reproduced in 16 C.F.R. § 455.2 at 266-67 (1986). The terms "vehicle," "used vehicle," and "dealer" are defined by the Rule to mean, in composite, any motorized vehicle, other than a motorcycle, with a gross vehicle weight rating of less than 8500 pounds, a curb weight of less than 6000 pounds, and a frontal area of less than 46 square feet, driven more than the limited use necessary in moving or road-testing a new vehicle prior to delivery to a consumer (not including any vehicle sold for scrap or parts), sold or offered for sale by any person or business selling or offering for sale five or more used vehicles in the previous twelve months. The Rule does not apply to banks or financial institutions, a business selling vehicles to an employee, or a lessor selling a leased vehicle by or to a lessee or to an employee of the lessee. A "consumer" under the Rule is simply any person who is not a "used vehicle dealer." 16 C.F.R. § 455.1(c)(1), (2), (3) & (4) (1986).

4. 16 C.F.R. § 455.2(b)(1) & (2) (1986). The vehicle may be offered without any implied warranty, i.e., "as is," (if permitted by state law), with implied warranty only, or with an express full or limited warranty. A "full" warranty is defined by the Federal Minimum Standards for Warranties set forth in section 104 of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2304 (1975) and applies only to vehicles manufactured after July 4, 1975.

2. A disclosure as to service contract liability;<sup>5</sup>
3. A suggestion that the consumer ask the dealer whether the vehicle may be inspected on or off the lot;<sup>6</sup>
4. A warning that spoken promises are difficult to enforce, coupled with a suggestion that the consumer obtain all promises in writing.<sup>7</sup>

This comment examines the possible impact of the Used Car Rule and the "Buyer's Guide" disclosures on Louisiana's implied warranty under the Civil Code articles on redhibition. Also analyzed are the effects of the rule in light of the Commission's stated goals and objectives and the existing warranty law in states which have adopted the Uniform Commercial Code. Finally, methods for consistent application of the rule under existing Louisiana law are suggested, including remedies which may be available under the Louisiana Unfair Trade Practices Act.

### *Purpose of the FTC Rule*

The Used Car Rule is narrowly focused to remedy two major unfair and deceptive trade practices employed by used car dealers. First, the Commission found that dealers routinely misrepresent to consumers the actual mechanical condition of the vehicle at the time of the sale. Second, the dealers often misrepresent their responsibility for repairing the vehicle after the sale, which gives rise to a multitude of consumer complaints. Abuses of the warranty to repair are particularly prominent where vehicles are sold "as is" with no warranty coverage. The Commission found that in many "as is" sales dealers promise orally to repair any defects which later arise, but the dealers fail to include the promise in writing as part of the sales contract. In this manner, the dealer can later refuse to remedy the defects, and the consumer who relied on oral promises must assume the cost of repairs.<sup>8</sup>

The Commission believed the "Buyer's Guide," attached to the vehicle and included in the sales contract, would discourage dealers from making oral promises which are later unenforceable. By requiring the warranty coverage in writing prior to the sale, used car buyers would then be

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5. 16 C.F.R. § 455.2(b)(3) (1986). The optional service contract is one other than a contract that is regulated in the state as part of the business of insurance. Louisiana dealers, whose contracts fall in the latter category, are currently seeking F.T.C. guidelines on the use of the disclosure.

6. The suggestion is near the bottom of the form. The capitalization, punctuation, and wording of all items, headings, and text on the form must be exactly as required by the Rule. See Buyer's Guide, supra note 3.

7. This disclosure appears on the form directly under the heading "Buyer's Guide." See Buyer's Guide, supra note 3.

8. Trade Regulation Rule; Sale of Used Motor Vehicles - Statement of Basis and Purpose, 49 Fed. Reg. 45,692, 45,696 (1984) (codified at 16 C.F.R. § 455).

able to make a purchasing decision based on accurate and complete information about the warranty protection offered.<sup>9</sup>

Under the Rule, a used car dealer may offer a car with no warranty, full warranty, or limited warranty by checking the applicable box on the "Buyer's Guide."<sup>10</sup> When the seller offers the vehicle without any implied warranty the label disclosure reads: "AS IS — NO WARRANTY. YOU WILL PAY ALL COSTS FOR ANY REPAIRS. The dealer assumes no responsibility for any repairs regardless of any oral statements about the vehicle."<sup>11</sup> The Rule provides, however, that an alternate paragraph must be substituted where state law limits or prohibits "as is" sales of vehicles. Also, state law overrides the "no warranty" language provided in the Rule.<sup>12</sup> In states which have adopted the UCC implied warranty, the effects of the "as is" disclosure on the buyer's rights to have the vehicle repaired after the sale are in marked contrast to those arising under the Louisiana Civil Code.

### *Effects Under the UCC*

Under the UCC, a seller who has reason to know of any particular purpose for which a buyer requires the goods is held to an implied warranty that the goods shall be fit for such purpose.<sup>13</sup> Nevertheless, the contract terms "as is" or "with all faults" exclude all implied warranties, when sufficiently conspicuous to call the buyer's attention to the lack of warranty.<sup>14</sup>

In formulating the "As Is" disclosure, the Commission expressed great concern for the significant legal impact that such sales have on

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9. 49 Fed. Reg. at 45,692 (1984) (codified at 16 C.F.R. § 455).

10. See Buyer's Guide, *supra* note 3.

11. 16 C.F.R. 455.2 (1986).

12. The paragraph states:

#### IMPLIED WARRANTIES ONLY

This means that the dealer does not make any specific promises to fix things that need repair when you buy the vehicle or after the time of sale. But, State law "implied warranties" may give you some rights to have the dealer take care of serious problems that were not apparent when you bought the vehicle.

16 C.F.R. § 455.2(b)(1)(ii) (1986).

13. Section 2-315 provides:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

UCC § 2-315 (1977).

14. UCC § 2-316(3)(a) (1977) states: "(a) [U]nless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties and make plain that there is no implied warranty."

consumers. Of particular concern was the UCC waiver of implied warranty, which effectively absolves the dealer from any responsibility for defects that exist at the time of the sale or after the sale is completed.<sup>15</sup> In addition, the Commission considered the impact of the parol evidence rule which was enacted in most states as part of the UCC and which excludes evidence of any oral agreement that contradicts the final written contract.<sup>16</sup> To remedy these concerns, the Commission employed disclosure language in the "As Is — No Warranty" paragraph of the "Buyer's Guide" which, because it must be conspicuous, puts the buyer on notice of the terms of the warranty and of the fact that oral statements by the dealer about the vehicle are not binding upon him. The requirement that the "Buyer's Guide" be incorporated into the contract of sale is intended to further prevent the buyer from relying on oral promises to repair.<sup>17</sup>

### *Effects Under the Louisiana Civil Code*

A different result is obtained when the "As Is" disclosure language is subjected to the requirements for an effective renunciation of implied warranty in Louisiana. The implied warranty expressed by Civil Code articles 2475 and 2476 that the thing sold be free from hidden vices and defects at the time of the sale arises in every sale.<sup>18</sup>

The warranty exists in favor of the buyer by operation of law. Thus, in contrast to the UCC seller, the Louisiana seller does not have the option to offer a vehicle without an implied warranty. Nevertheless, Civil Code article 11 indicates that the buyer may renounce what the law has established in his favor, including this implied warranty.<sup>19</sup> The

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15. 49 Fed. Reg. at 45,697 (1984) (codified at 16 C.F.R. § 455).

16. Section 2-202 of the UCC states:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

UCC 2-202 (1977).

17. 16 C.F.R. § 455.3(b) (1986).

18. La. Civ. Code art. 2475 binds the seller to two principal obligations: to deliver and to warrant the thing which he sells. Article 2476 states: "The warranty respecting the seller has two objects; the first is the buyer's peaceable possession of the thing sold, and the second is the hidden defects of the thing sold or its redhibitory vices."

19. La. Civ. Code art. 11 provides that individuals may renounce what the law has established in their favor where it is not prohibited, will not affect the rights of others, and where it is not contrary to the public good. See Comment, Modification or Renunciation of Warranty in Louisiana Sales Transactions, 46 Tul. L. Rev. 894 (1972).

Louisiana Supreme Court, in *Prince v. Paretti Pontiac Co.*,<sup>20</sup> established three criteria which must be met for a buyer's renunciation of the implied warranty to be effective. The renunciation, also referred to as a "waiver of warranty," must be (1) written in clear and unambiguous language, (2) included in the contract of sale, and (3) read and explained to the buyer. Courts have consistently refused to find a valid waiver where the seller offers the vehicle "as is" with no warranty. Instead, such a stipulation by the seller only modifies his obligation to repair under the implied warranty against redhibitory defects.<sup>21</sup>

### *Redhibitory Defects In Used Car Sales*

The redhibitory action is available when a nonapparent defect that existed in the object at the time of the sale "renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice."<sup>22</sup> When the object of the sale is a new item, the good faith seller is obligated to attempt to repair serious, nonapparent defects or to return the purchase price if he is unable to repair the defects.<sup>23</sup> Those defects in new vehicles which constitute redhibitory vices and which give rise to a buyer's action for rescission of the sale are either serious inconveniences or accumulations of less serious imperfections.<sup>24</sup>

Where used vehicles are sold "as is," however, the seller modifies his obligation to repair. Only those defects so serious as to prevent the car from running give rise to the redhibitory action.<sup>25</sup> In *Juneau v. Bob*

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20. 281 So. 2d 112 (La. 1973). See also *Media Prod. Consultants, Inc. v. Mercedes-Benz of North America, Inc.*, 262 La. 80, 262 So. 2d 377 (1972); *Anderson v. Bohn Ford, Inc.*, 291 So. 2d 786 (La. App. 4th Cir. 1973); *Guidry v. St. John Auto Exchange*, 379 So. 2d 878 (La. App. 4th Cir. 1980).

21. *Roche v. Broussard*, 252 So. 2d 690 (La. App. 3d Cir. 1971); *McLain v. Cuccia*, 259 So. 2d 337 (La. App. 4th Cir. 1972); *Juneau v. Bob McKinnon Chevrolet Co.*, 260 So. 2d 919 (La. App. 4th Cir. 1972); *Stracener v. Nunally Bros. Motor Co.*, 11 La. App. 545, 123 So. 911 (1st Cir. 1929).

22. La. Civ. Code art. 2520.

23. La. Civ. Code art. 2531.

24. See, e.g., *Anderson v. Bohn Ford, Inc.* 291 So. 2d 786 (La. App. 4th Cir. 1973); *Dunlap v. Chrysler Motors Corp.*, 299 So. 2d 495 (La. App. 4th Cir. 1974); *Prince v. Paretti Pontiac Co.*, 281 So. 2d 112 (La. 1973); *Stumpf v. Metairie Motor Sales, Inc.*, 212 So. 2d 705 (La. App. 4th Cir. 1968).

25. *Juneau v. Bob McKinnon Chevrolet Co.*, 260 So. 2d 919 (La. App. 4th Cir. 1972) (engine smoked and leaked oil, stalled and could not be restarted); *McLain v. Cuccia*, 259 So. 2d 337 (La. App. 4th Cir. 1972) (failure to start which could only be repaired by replacing the engine). But see *Hill v. Coleman Oldsmobile, Inc.*, 424 So. 2d 1049 (La. App. 1st Cir. 1982) (cracked engine heads merit only reduction of the price, not avoidance of sale), cert. denied 430 So. 2d 77 (La. 1983); *Rosenthal v. Clearview Dodge Sales*, 464 So. 2d 777 (La. App. 5th Cir. 1985) (grinding in the rear end not a defect requiring return of the price).

*McKinnon Chevrolet Co.*,<sup>26</sup> the fourth circuit court of appeal granted rescission of the sale of a used vehicle sold "as is." In holding that the buyer's action in redhibition was not precluded by the terms of the seller's warranty, the court stated that, although the car was not warranted to be in perfect condition and to be free from all defects which prior usage and age may cause, the warranty that the car was in running condition was not excluded by a sale "as is." Thus, a sale made "as is" with no warranty, in effect, reduces the number of actionable defects for which a buyer may seek repair or rescission.

In light of the many decisions in favor of the buyer in situations where used cars are sold "as is," apparently Louisiana is within the category of states contemplated by the Rule which requires the substitution of the "Implied Warranties Only" paragraph when state law limits or prohibits "as is" sales of used vehicles.<sup>27</sup> For reasons to be discussed below, the use of the alternate disclosure would give rise to difficulties in cases where the buyer also executes a purported renunciation of the implied warranty.

#### *Renunciation of Implied Warranty*

Civil Code article 2474 imposes the burden on the seller to "explain himself clearly respecting the extent of his obligations."<sup>28</sup> Therefore, any unexplained or ambiguous term or phrase in the contract of sale is not freely and deliberately consented to by the buyer.<sup>29</sup> Consequently, the seller may not enforce a renunciation unless it is written in clear and unambiguous terms. For the renunciation to be effective, it must also be contained in the sales contract and must be read and explained to the buyer.<sup>30</sup> Nevertheless, Louisiana courts have had difficulty in formulating standards for a "clear and unambiguous" waiver.

In *Hendricks v. Horseless Carriage, Inc.*,<sup>31</sup> the second circuit court of appeal granted rescission of the sale of a used car despite a statement written by the buyer on the bill of sale providing: "I buy this car with no warranty." The transaction was consummated beneath a sign that was printed in eight-inch letters and which read: "ALL CARS SOLD AS IS, PLEASE TEST BEFORE BUYING." Applying the *Prince* criteria, the court held that, although the waiver was contained in the sale

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26. 260 So. 2d 919 (La. App. 4th Cir. 1972).

27. 16 C.F.R. § 455.2(b)(1)(ii) (1986).

28. La. Civ. Code art. 2474.

29. *Edwards v. Port AMC/Jeep, Inc.*, 337 So. 2d 276 (La. App. 2d Cir. 1976), cert. denied, 339 So. 2d 854 (La. 1976); *Stumpf v. Metairie Motor Sales, Inc.*, 212 So. 2d 705 (La. App. 4th Cir. 1968) (waiver must be specific and unequivocal).

30. *Prince*, 281 So. 2d 112 (La. 1973).

31. 332 So. 2d 892 (La. App. 2d Cir. 1976).

document and the buyer was made aware of the terms, as evidenced by her own statement, the term "sold as is" was insufficient to clearly and unambiguously convey to the buyer what rights she purportedly was renouncing. The court noted the impossibility of supplying legally sacramental language which would be sufficient in all cases to constitute a valid renunciation, opting instead to follow a case-by-case approach, subjecting the particular language used by the seller to the three criteria set forth by the Louisiana Supreme Court in *Prince*.

This approach has been employed in every recent court decision where the validity of a buyer renunciation has been at issue. As a result, a seller seeking to devise an enforceable renunciation agreement is burdened with gleaning the appropriate language from the various court decisions. The burden is even greater when it is discovered that of the numerous sales agreements submitted for the scrutiny of the courts, not one has been upheld as an effective renunciation in cases which involve an ordinary consumer seeking his rights against a sophisticated businessman.<sup>32</sup>

Louisiana courts traditionally have considered the relative status of the parties when enforcing contractual agreements. Concern for the party least in a position to knowingly and freely bargain, most often the consumer, was evidenced in *Hendricks* where the court noted that the purchaser (a 39-year-old woman with eleven years of schooling and buying her first car) was not "equal in experience to the dealer in used cars for many years."<sup>33</sup>

Concern for the average buyer led to the rejection of another purported renunciation in *Thibodeaux v. Meaux's Auto Sales, Inc.*<sup>34</sup> The buyer, a woman with a sixth-grade education, was incapable of understanding the legal terminology used in the agreement. In *Thibodeaux*, the third circuit court of appeal granted rescission of the sale of the used car where the provisions of the purported waiver were included in the bill of sale and were signed by the buyer: "Purchaser, (signed) Irene D. Thibodeaux, does hereby waive the warranty of fitness or guarantee against redhibitory vices applied in Louisiana by operation of law, more specifically, that warranty imposed by the Civil Code Article 2476, or other applicable law." Because the court determined that the waiver could not be understood by the average buyer, it held the waiver to be unclear and ambiguous and, therefore, ineffective. The court found

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32. *Wolfe v. Henderson Ford, Inc.*, 277 So. 2d 215 (La. App. 3d Cir. 1973) (recognizing that such limitations of liability are not the result of the actual bargaining and should not be given literal effect).

33. *Hendricks*, 332 So. 2d at 892 (La. App. 2d Cir. 1976). See also *GMAC v. Johnson*, 426 So. 2d 691 (La. App. 1st Cir. 1982).

34. 364 So. 2d 1370 (La. App. 3d Cir. 1978).



further that the waiver had neither been brought to the attention of the buyer nor explained to her.<sup>35</sup>

In *Lee v. Blanchard*<sup>36</sup> the court granted rescission of the sale of a used car wherein the contract contained in fine print the following renunciation: "It is agreed and understood that no warranties of any kind or character, either express or implied, are made by you of and concerning the car delivered to me, other than the usual manufacturer's warranties."<sup>37</sup> The court held that at the time of the sale, there was no specific agreement concerning the waiver of warranty. Relying on prior decisions, the court stated: "An exclusion or waiver of warranty by which parties take themselves out of the coverage of specific or general law and make a law unto themselves must be strictly construed."<sup>38</sup> Thus, the court reiterated the rule that, unless the waiver is specific and unequivocal, the agreement will be construed in favor of the buyer.

Applying these judicial criteria for a valid renunciation to the "As Is" disclosure in the "Buyer's Guide," a Louisiana court would find the waiver invalid because it fails to clearly and specifically disclose the rights available under redhibition to which the purchaser is entitled by law and which he is renouncing. Although the statement "You will pay all costs for any repairs" is specific, it fails to apprise the buyer of the dealer's obligation, absent an agreement to the contrary, to attempt to repair any defect which renders the vehicle absolutely useless. There is also no mention of the buyer's rights to a rescission of the sale, to a return of the purchase price, and to the costs of other expenses that were occasioned by the sale if the dealer is unable to repair the defective vehicle.<sup>39</sup> Finally, the statement that a dealer assumes no responsibility for any oral statements about the vehicle may render the waiver invalid because contrary oral statements upon which the buyer based his decision to purchase may lead the court to conclude that there was no agreement about the terms of the waiver, as in *Lee*. Thus, the insertion of the "Buyer's Guide" complicates an already nebulous process for determining when a buyer can get his money returned or when a buyer can have the defect repaired.

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35. *Thibodeaux*, 364 So. 2d at 1372. See also *Wolfe v. Henderson Ford, Inc.*, 277 So. 2d 215 (La. App. 3d Cir. 1973).

36. 264 So. 2d 364 (La. App. 1st Cir. 1972).

37. *Id.* at 367.

38. *Id.* at 368; see *Stumph v. Metairie Motor Sales, Inc.*, 212 So. 2d 705 (La. App. 4th Cir. 1968).

39. Other expenses include sales tax, license and title transfer fees, finance charges incurred under financing arranged by the seller's agent, and the sum the buyer paid for worthless repairs to the vehicle. *Lee*, 264 So. 2d at 367.

*Renunciation Under Magnuson-Moss*<sup>40</sup>

If a used car dealer offers the car with either limited or full warranty and discloses this fact on the "Buyer's Guide," he is prohibited under Section 108 of the Magnuson-Moss Warranty Act from disclaiming or modifying any implied warranty created by state law.<sup>41</sup> Under this Act, any buyer renunciation, regardless of clarity and explanation, is void if made in conjunction with a sale where an express warranty is offered.

*Implied Warranties Only*

If a used car dealer chooses to substitute the "Implied Warranties Only" paragraph for the "As Is — No Warranty" disclosure, he is not making "any specific promises to fix things that need repair," but representing to the consumer that state law implied warranties may give the consumer the right to have serious nonapparent defects repaired by the dealer.<sup>42</sup>

A problem may arise, however, when a buyer of a car sold with "Implied Warranties Only" attempts to renounce the warranty by means of a separate waiver. Because both the "Buyer's Guide" and the renunciation must be included in the contract, ambiguity is created in that the buyer makes an agreement that is subject to an implied warranty but that also purports to renounce the warranty.<sup>43</sup> In Louisiana, the seller must clearly express the extent of his obligation, and courts must resolve any ambiguity in favor of the buyer.<sup>44</sup> Thus, there is little possibility that a waiver could be effective in this situation. Regardless of the clarity of the language that is included in the waiver and of its being read and explained, the waiver will conflict with the terms of the disclosure. The use of this paragraph, although consistent with the Louisiana Civil Code, may defeat attempts by the seller to have the buyer renounce his rights.

*Remedies*

The Louisiana Unfair Trade Practices Act (UTPA) may provide a remedy, in addition to redhibition, to a buyer who is seeking rescission

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40. The Magnuson-Moss Warranty - Federal Trade Commission Improvement Act, 15 U.S.C. § 2301-2312 (1982). The Act applies to all consumer products covered by a written warranty manufactured after July 4, 1975, and distributed in commerce. The Act does not require anyone to give warranty, but regulates those who decide to offer a written, express warranty. See generally, Banks, *The Magnuson-Moss Warranty Act: An Untapped Adjunct to the Law of Redhibition*, 26 Loy. L. Rev. 263 (1980); see also *Ventura v. Ford Motor Corp.*, 180 N.J. Super. 45, 433 A.2d 801 (1981).

41. 15 U.S.C. § 2308(a) (1982).

42. 16 C.F.R. § 455.2(b)(1)(ii) (1986).

43. La. Civ. Code art. 2474.

44. *Id.*

of the sale of a used vehicle that was purchased "as is" with no warranty. The UTPA makes unlawful all unfair and deceptive acts or practices in the conduct of any trade or commerce.<sup>45</sup> Section 1406(4) of the UTPA exempts from coverage "[a]ny conduct which complies with section 5(a)(1) of the Federal Trade Commission Act . . . , any rule or regulation promulgated thereunder and any finally adjudicated court decision interpreting the provisions of said Act, rules and regulations."<sup>46</sup> Although the Used Car Rule falls within the category of rules promulgated pursuant to Section 5(a)(1) of the FTCA, the use of the "As Is" disclosure in Louisiana is not in compliance with the Used Car Rule, as the Rule mandates the insertion of the "Implied Warranties Only" language in states such as Louisiana which limit "as is" sales. Thus, the injured consumer may have a private action under UTPA in addition to his action in redhibition.

The UTPA does not define the terms "unfair" or "deceptive," but Louisiana courts have formulated guidelines that are based on FTC and federal court decisions interpreting the federal statute.<sup>47</sup> Under Louisiana jurisprudence, a practice is unfair when it "offends established public policy, and when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers."<sup>48</sup> Violations of the UTPA have been found in cases where the seller affirmatively misrepresents a material fact upon which the buyer relies in making a purchase.<sup>49</sup>

The "As Is — No Warranty" disclosure states: "The dealer assumes no responsibility for any repairs."<sup>50</sup> In Louisiana, this statement misrepresents the seller's obligation to repair a used vehicle if the defect existed and was not apparent at the time of the sale. An unscrupulous

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45. La. R.S. 51:1401-1418 (Supp. 1986). Section 1405(A) states: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." See Comment, *The Louisiana Unfair Trade Practice and Consumer Protection Act: An Analysis*, 34 La. L. Rev. 634 (1974); Hersbergen, *Developments in the Law, 1981-1982—Consumer Protection*, 42 La. L. Rev. 513, 518 (1982).

46. La. R.S. 51:1406(4) (Supp. 1986).

47. Modeled after section 5 of the Federal Trade Commission Act (FTCA), section 1405(A) of the UTPA is identical to the federal law except for including to trade as well as commerce. 15 U.S.C. § 45(a)(1) (1982).

48. *Coffey v. Peoples Mortgages & Loan of Shreveport*, 408 So. 2d 1153 (La. App. 2d Cir. 1981); *Moore v. Goodyear Tire and Rubber Co.*, 364 So. 2d 630 (La. App. 2d Cir. 1978).

49. *State ex rel. Guste v. Crossroads Gallery*, 357 So. 2d 1381 (La. App. 4th Cir. 1978) (comparative pricing practice held to be "unfair and deceptive"); *Faris v. Model's Guild*, 297 So. 2d 536 (La. App. 4th Cir. 1974), cert. denied, 302 So. 2d 15 (La. 1974) (offering of course of instruction by one not licensed as required by law was inferably in violation of the Act).

50. 16 C.F.R. 455.2 (1986).

dealer could easily prey on a consumer who is unaware of the seller's obligation by refusing to accept the consumer's tender for repair. Because, absent valid renunciation, the disclosure alone is insufficient to waive the warranty, a representation by the dealer that he is not, in fact, responsible for repairs is deceptive and misleading. A consumer who brings an action under the UTPA has the advantage of recovering, not only damages, but attorney's fees, thus overcoming a major drawback in the redhibitory action.<sup>51</sup>

The UTPA provides two different methods of attacking unlawful conduct. The state can initiate action for injunctive relief against a party whose conduct is deemed to be an unfair trade practice when a series of violations has occurred. The court, in such an action, can order that any injured party be returned to the status quo ante. In addition, the UTPA provides for a private cause of action based on a single violation, and recovery may include actual or treble damages, attorney's fees, and court costs.<sup>52</sup>

If the "As Is" disclosure is coupled with an effective renunciation, the seller has no further obligation after the completed sale, and the FTC disclosure is not deceptive. The current indications are, however, that it is unlikely that a seller can meet the three requirements for an effective renunciation imposed by the courts. If the waiver is ineffective, the buyer has not renounced the implied warranty, and the disclosure is misleading. It appears that the UTPA makes available a private action to a consumer in such a situation. Additionally, the defective waiver itself may be deemed deceptive if the language misrepresents the buyer's rights or if the explanation offered is ambiguous or unclear.

### *Conclusion*

The purchase of a used car today represents a substantial consumer investment. Louisiana courts have rejected the common law doctrine of caveat emptor in favor of protecting the unsophisticated purchaser who deals with a sophisticated businessman. In Louisiana, the Used Car Rule, while attempting to prevent dealer misrepresentations, increases the un-

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51. La. R.S. 51:1409 (Supp. 1986). La. Civ. Code art. 2545 provides attorney's fees and damages for a buyer who purchases from a bad faith seller who knew the thing sold was defective and failed to tell the buyer. A used car dealer who is not a manufacturer is not presumed to have knowledge, so the buyer must prove the dealer's knowledge of the defect. Under the UTPA, recovery of attorney's fees and damages does not require proof of knowledge of the defect. See *Huffman-Euro Motors, Inc. v. Physical Therapy Services, Ltd.* 373 So. 2d 565 (La. App. 3d Cir. 1979); *Lee v. Shaw*, 402 So. 2d 152 (La. App. 1st Cir. 1981); see generally Comment, *Statutory Award of Attorney's Fees in Louisiana*, 20 *Loy. L. Rev.* 343 (1973-74).

52. La. R.S. 51:1409 (Supp. 1986).

certainties of commercial dealers as to the effectiveness of buyer renunciations.

Two methods of achieving consistency between Louisiana and federal law are possible. First, the legislature or the courts could definitively state the required language for a clear and concise waiver. In this way, dealers could rely on the courts' upholding the waiver and could display the "As Is" disclosure with confidence that it is not deceptive or misleading. The three criteria for the validity of a buyer renunciation set forth in *Prince* would need to be re-examined in light of explicit language sanctioned by the legislature or the courts. Louisiana would thereby join the majority of states which place the burden on the buyer to be aware of what he is signing.

Secondly, the legislature could expressly state that an implied warranty may not be waived in connection with the sale of any used motor vehicle. This approach accomplishes what, in effect, the courts have already established by placing stringent requirements on renunciation which no dealer has yet met. With such a prohibition in force, use of the "Implied Warranties Only" disclosure would effectively express Louisiana warranty law and would offer further protection to the consumer.

*Janet Resetar*

# BUYERS GUIDE

**IMPORTANT:** Spoken promises are difficult to enforce. Ask the dealer to put all promises in writing. Keep this form.

VEHICLE MAKE \_\_\_\_\_ MODEL \_\_\_\_\_ YEAR \_\_\_\_\_ VIN NUMBER \_\_\_\_\_

DEALER STOCK NUMBER (Optional) \_\_\_\_\_

**WARRANTIES FOR THIS VEHICLE:**

**AS IS - NO WARRANTY**

**YOU WILL PAY ALL COSTS FOR ANY REPAIRS.** The dealer assumes no responsibility for any repairs regardless of any oral statements about the vehicle.

**WARRANTY**

**FULL LIMITED WARRANTY.** The dealer will pay \_\_\_\_\_% of the labor and \_\_\_\_\_% of the parts for the covered systems that fail during the warranty period. Ask the dealer for a copy of the warranty document for a full explanation of warranty coverage, exclusions, and the dealer's repair obligations. Under state law, "implied warranties" may give you even more rights.

**SYSTEMS COVERED:**

**DURATION:**

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**SERVICE CONTRACT.** A service contract is available at an extra charge on this vehicle. Ask for details as to coverage, deductible, price, and exclusions. If you buy a service contract within 90 days of the time of sale, state law "implied warranties" may give you additional rights.

**PRE PURCHASE INSPECTION: ASK THE DEALER IF YOU MAY HAVE THIS VEHICLE INSPECTED BY YOUR MECHANIC EITHER ON OR OFF THE LOT.**

**SEE THE BACK OF THIS FORM** for important additional information, including a list of some major defects that may occur in used motor vehicles.

Below is a list of some major defects that may occur in used motor vehicles.

**Frame & Body**

Frame-cracks, corrective welds, or rusted through  
Dogtracks—bent or twisted frame

**Engine**

Oil leakage, excluding normal seepage  
Cracked block or head  
Belts missing or inoperable  
Knocks or misses related to camshaft lifters and  
push rods  
Abnormal exhaust discharge

**Transmission & Drive Shaft**

Improper fluid level or leakage, excluding normal  
seepage  
Cracked or damaged case which is visible  
Abnormal noise or vibration caused by faulty  
transmission or drive shaft  
Improper shifting or functioning in any gear  
Manual clutch slips or chatters

**Differential**

Improper fluid level or leakage excluding normal  
seepage  
Cracked or damaged housing which is visible  
Abnormal noise or vibration caused by faulty  
differential

**Cooling System**

Leakage including radiator  
Improperly functioning water pump

**Electrical System**

Battery leakage  
Improperly functioning alternator, generator,  
battery, or starter

**Fuel System**

Visible leakage

**Inoperable Accessories**

Gauges or warning devices  
Air conditioner  
Heater & Defroster

**Brake System**

Failure warning light broken  
Pedal not firm under pressure (DOT spec.)  
Not enough pedal reserve (DOT spec.)  
Does not stop vehicle in straight (DOT spec.)  
Hoses damaged  
Drum or rotor too thin (Mfr. Specs.)  
Lining or pad thickness less than 1/32 inch  
Power unit not operating or leaking  
Structural or mechanical parts damaged

**Steering System**

Too much free play at steering wheel (DOT specs.)  
Free play in linkage more than 1/4 inch  
Steering gear binds or jams  
Front wheels aligned improperly (DOT specs.)  
Power unit belts cracked or slipping  
Power unit fluid level improper

**Suspension System**

Ball joint seats damaged  
Structural parts bent or damaged  
Stabilizer bar disconnected  
Spring broken  
Shock absorber mounting loose  
Rubber bushings damaged or missing  
Radius rod damaged or missing  
Shock absorber leaking or functioning improperly

**Tires**

Tread depth less than 2/32 inch  
Sizes mismatched  
Visible damage

**Wheels**

Visible cracks, damage or repairs  
Mounting bolts loose or missing

**Exhaust System**

Leakage

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DEALER

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ADDRESS

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SEE FOR COMPLAINTS

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**IMPORTANT:** The information on this form is part of any contract to buy this vehicle. Removal of this label before consumer purchase (except for purpose of test-driving) is a violation of federal law (16 C.F.R. 455).