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WHAT CHANCE FOR THE NEW CAR PURCHASER OF A "LEMON"?

As the average new car buyer drives his automobile off the dealer's lot, he probably anticipates dependable service for at least a year, and in the majority of instances the buyer is not disappointed. However if the automobile should fail to give the anticipated service to such an extent that the buyer's faith in the dependability of the car is destroyed, what alternatives does the purchaser have? Is he committed to the original purchase or can he reasonably expect to get out from under the responsibility incurred in the purchase of his "lemon"? This question cannot be answered definitively, of course, apart from an examination of the circumstances involved in a given fact situation. The recent Iowa decision of *Bayne v. Nall Motors, Inc.*[1] gives one example of such a situation and serves as a frame of reference for analysis of the problem in Kentucky.

On April 13, 1971, David Bayne purchased from Nall Motors in Iowa City, Iowa, a 1971 Chevrolet Malibu for which he paid $3,812.02. He signed the purchase order without reading it. There was no discussion of warranty and the salesman admitted that Bayne was in a hurry. Four days after the purchase and after only 406 miles, the Malibu came to a sudden stop from 25 miles per hour. The driver stated that the force of the sudden deceleration would have thrown him into the windshield if he had not been wearing his seat belt. The sudden stop was caused by a complete absence of lubricant in the differential. Since lubricant was not present, friction produced such intense heat that the parts were mechanically frozen or welded together, and it was necessary to use a torch to cut the differential away from the axles.[2]

Nall Motors had followed the inspection procedure set out by General Motors, and the damage done was the direct result of the negligence of General Motors in failing to install lubricant in the rear axle housing of Bayne's automobile. Nall Motors attempted to repair the car by replacing the entire differential except for one axle. Nall's employees insisted that there was no damage which had not been repaired. The District Court of Johnson County felt otherwise, finding "that this was a major defect of a highly complex nature with possibilities of damage to other major parts of the vehicle, subjecting the purchaser to risk of future repairs and uncertainty."[3]

The dealer's responsibility in this case was predicated on the im-

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[1] Bayne v. Nall Motors, Inc., No. 40609 (D. Iowa, May 16, 1973).
[2] *Id.*
[3] *Id.*

plied warranty that a new automobile sold by a dealer should be reasonably fit for the purpose for which it is sold.[4] However, the purchase order signed by Bayne contained the following disclaimer of warranty:

> It is understood and agreed by purchaser that the vehicle above described is sold by the dealer "as is" and that the dealer makes no warranty of merchantability of the vehicle and makes no warranty that such vehicle is fit for any particular purpose.[5]

The court rather easily disposed of this waiver through application of the Uniform Commercial Code § 2-316[6] [hereinafter referred to as the UCC]. Under this section waiver of implied warranty is permitted, but any disclaimer of warranty must be conspicuous. Since Bayne had not read the purchase order and the salesman had not discussed the disclaimer with him, the disclaimer was held not to be conspicuous. Any disclaimer of warranty that is not conspicuous is not valid, and therefore, Nall's attempt to avoid warranties failed.

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[4]The court based this finding on State Farm Mutual Auto Insurance Co. v. Anderson-Weber, Inc., 110 N.W.2d 449 (Iowa 1961) and the UNIFORM COMMERCIAL CODE § 2-315 [hereinafter cited as UCC]; IOWA CODE ANN. § 554.2315 (1972). This section grants the buyer an implied warranty of fitness:

> 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.

The *State Farm Insurance* case involved the following disclaimer:

> The dealer's obligation is limited to replacement of, without charge to purchaser, such parts as shall be returned to dealer, with transportation charges prepaid and as shall be acknowledged by dealer to be defective. State Farm Insurance, *supra*, at 451.

This disclaimer was on the reverse side of the contract, and under the circumstances it was not specific enough to meet the standard of the UNIFORM SALES ACT, which was then the law in Iowa. A Kentucky case dealing with a similar question is Water Works & Industrial Supply Co. v. Wilburn, 437 S.W.2d 951 (Ky. 1968). There the Court of Appeals ruled that a seller's express warranty of material and workmanship, with liability restricted to replacement cost excluding labor or damages, did not exclude the implied warranty of fitness as guaranteed by KY. REV. STAT. § 355.2-315 (1972) [hereinafter cited as KRS].

[5] Bayne, *Replacement vs. Repair: A Consumer's Brief Challenges General Motors*, 24 SYRACUSE L. REV. 639, 679 (1973). The plaintiff's brief was published as a lead article in this law review. In his brief, Bayne, a professor at the University of Iowa Law School, acted as his own counsel.

His brief makes many arguments not discussed by the court. For example, the brief considers the public policy issues against the purchase order disclaimer as the major considerations in favor of the plaintiff. The court, however, does not go beyond the question of conspicuousness. The brief also discusses strict liability in tort as a possible theory on which Bayne could recover.

[6] UCC § 2-316; IOWA CODE ANN. § 554.2316 (1972); KRS § 355.2-316. This section reads in part:

> . . . to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.

Without the defense of disclaimer of warranty, the only other theory on which the defendant could avoid rescission of the contract was the seller's right to cure a breach by repair as guaranteed by UCC § 2-508.[7] This section permits a seller to avoid revocation of acceptance by repairing minor defects. The distinction between a repairable defect and one which makes the vehicle less acceptable than a similar automobile is crucial to the result here.[8] The court felt that due to the tremendous heat and the force of the internal impact involved, a reasonable buyer could not be expected to be satisfied simply with a new differential. Since the possibility of damage went further than the parts replaced, the court found that Bayne was entitled to rescind his contract.[9]

The treatment of disclaimer of warranty and the question of rescission in *Bayne* are the matters of importance to this discussion. While the Iowa court easily discards the disclaimer and treats it only as a minor issue in its brief opinion, Kentucky law would not permit a court to achieve that result so easily.[10] An examination of the authorities cited in *Bayne* and the Kentucky law on this issue is in order.

The Iowa court relied on the application of the UCC made in *Zabriskie Chevrolet, Inc. v. Smith*[11] both for the proposition that there is an implied warranty of fitness in the sale of a new automobile and for the principle that this warranty cannot be restricted by express warranty.[12] The plaintiff in *Zabriskie* purchased a new Chevrolet which became stuck in low gear less than a mile from the place where

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[7] UCC § 2-508; IOWA CODE ANN. § 554.2508 (1972); KRS § 355.2-508. This section reads:

> (1) Where any tender or delivery by the seller is rejected because nonconforming 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.
>
> (2) Where the buyer rejects a nonconforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

The application of this section to *Bayne* and other breach of warranty cases may be more by analogy in that § 2-508 seems designed expressly for the nonconforming delivery of goods situation. In such cases the buyer's actions constitute a rejection of the goods and not a revocation of acceptance as we have in *Bayne*. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 8-3, at 253-56 (1972) discusses this distinction, which basically turns on whether or not the buyer has accepted the goods.

[8] Comment, *Sales of Personal Property—Breach of Warranty—Repair as a Means of Cure Under Section 2-508 of the Uniform Commercial Code*, 53 IOWA L. REV. 780, 788 (1967).

[9] Bayne v. Nall Motors, Inc., No. 40609 (D. Iowa, May 16, 1973).

[10] Cox Motor Car Co. v. Castle, 402 S.W.2d 429 (Ky. 1966); and L. R. Cooke Chevrolet Co. v. Culligan Soft Water Service of Lexington, 282 S.W.2d 349 (Ky. 1955).

[11] 240 A.2d 195 (N.J. 1968).

[12] *Id.* at 198.

his wife took possession of the vehicle. The dealer replaced the transmission with one from another automobile rather than a new one. On the reverse side of the purchase order was a denial of all warranties except the express dealer warranty, which allowed only for the replacement of defective parts. The New Jersey court permitted rescission of the contract.

The court used the "conspicuous" requirement of the UCC as one method of attacking the disclaimer of warranty,[13] but it also found the disclaimer void on grounds of unconscionability and for reasons of public policy.[14] These policy considerations form the more straightforward approach to the problem. Citing § 2-302[15] on unconscionability as a basis for its approach, the court in *Zabriskie* quotes from an earlier New Jersey decision, *Henningsen v. Bloomfield Motors, Inc.*,[16] in which the court stated:

> . . . we are of the opinion that Chrysler's attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity.[17]

The disadvantageous position of the consumer in the purchase of a new automobile precipitates the application of remedies against possible unconscionable contracts. He must submit to a standardized adhesion contract or forego the purchase of a new car. His contractual options are eliminated by the common practices of the automobile industry.[18] In reality, it is not possible for him to purchase a new car without accepting the terms of the dealer's contract, which terms for the most part are designed to serve the dealer's convenience. This situation would seem to allow unconscionability as a line of reasoning in cases involving disclaimers of warranty. Despite this possibility courts are often satisfied with the "conspicuous" requirement

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[13] *Id.* at 199. "The attempted limitations of those warranties were not 'conspicuous' and hence failed in their purpose." This is required by N.J. STAT. ANN. § 12A2-316 (1972).

[14] *Id.* at 198.

[15] UCC § 2-302(1) reads:
If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

[16] 161 A.2d 69 (N.J. 1960).

[17] *Id.* at 95.

[18] *Id.* at 85. The court stated:
In a society such as ours, where the automobile is a common and necessary adjunct of daily life, and where its use is so fraught with danger to the driver, passengers and the public, the manufacturer is under a special obligation in connection with the construction, promotion and sale of his cars. Consequently, the courts must examine purchase agreements closely to see if consumer and public interests are treated fairly.

of § 2-316 as a means of voiding a disclaimer of warranty,[19] and in that way decisions are more particularized to specific fact situations. The trial court in *Bayne* found violation of the "conspicuous" requirement sufficient to void the disclaimer, but the Court of Appeals of Kentucky has not always been willing to follow this approach.

The Kentucky case of *Myers v. Land*[20] uses both the failure to express the disclaimer plainly and failure of consideration as the basis for rescission of a contract for the sale of a concrete mixer. This case was decided under the Uniform Sales Act, but the language of part of the Court's decision is similar to language used in discussing the "conspicuous" requirement of the UCC in later cases. After recognizing the ability of contracting parties to eliminate implied and express warranties, the Court stated, "But we have always required that such limitation of liability shall be plainly expressed."[21] They found the disclaimer involved explicit enough but still ineffective because it was buried "in a long and formidable document prepared by the seller and that it is doubtless unnoticed or its import uncomprehended by the buyer."[22] In addition to attacking the disclaimer on the grounds that it was not plainly expressed, the Court entertained policy arguments:

> Anyone brought up to believe that for every wrong there is a remedy will pause before saying that the seller will escape all liability by merely putting in an order blank a statement to the effect that there is no assurance that the buyer will get a machine that will work. We have paused for the moment and have readily concluded that the avoidance of liability under such a circumstance is not permitted by the law.[23]

Other jurisdictions share this disapproval of disclaimers,[24] but later Kentucky decisions have altered the impact of *Myers*.[25]

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[19] Comment, *Rescission of an Auto Sale Under the Uniform Commercial Code —How to Get Rid of a Four-Wheeled Lemon*, 26 U. MIAMI L. REV. 648 (1972).

[20] 235 S.W.2d 988 (Ky. 1951).

[21] *Id.* at 990.

[22] *Id.*

[23] *Id.* at 991.

[24] Marion Power Shovel Co. v. Huntsman, 437 S.W.2d 784 (Ark. 1969); Tiger Motor Co., Inc. v. McMurty, 224 So.2d 638 (Ala. 1969).

In *Marion Power Shovel Co.*, the disclaimer was in an instruction booklet delivered subsequent to the sale and the disclaimer was not conspicuous. *Tiger Motor Co.* also involved a warranty that was delivered after the sale. In that case the buyer did not receive the warranty until the day after he accepted his new automobile, and there was no evidence that he was informed of the disclaimer provisions. These two and other cases holding disclaimers void are discussed in West, *Disclaimer of Warranties—Its Curse and (Possible) Cure*, 76 COMM. L.J. 253, 256 (1971).

[25] L. R. Cooke Chevrolet Co. v. Culligan Soft Water Service of Lexington, 282 S.W.2d 349 (Ky. 1955); and Childers & Venters, Inc. v. Sowards, 460 S.W.2d 343 (Ky. 1970).

The Court of Appeals upheld an automobile dealer's disclaimer in *L. R. Cooke Chevrolet Co. v. Culligan Soft Water Service of Lexington.*[26] It acknowledged *Myers,* but found that the equities involved did not call for the same policy considerations used to avoid the disclaimer in the earlier decision. In *Cooke,* the buyer of a new truck claimed breach of the implied warranty that the truck was reasonably suited for the purposes for which it was intended to be used. This claim arose out of an accident that occurred two weeks after the vehicle was purchased. The driver of the truck claimed he lost control due to vibration in the front wheels. He had not previously reported this vibration to anyone, and the witnesses to the accident could not say what caused the truck to leave the road.[27] Plaintiff's use of the truck before the accident without giving notice of the defect to the defendant influenced the Court's decision to distinguish this case from *Myers.* In *Myers* the machinery was *wholly* inadequate for the purpose intended.[28] Another case upholding the disclaimer of warranty is *Cox Motor Co. v. Castle.*[29] The court allowed a rescission of the contract in that case by finding a violation of express warranty. The fact that the Court saw this alternative may have deterred it from finding the disclaimer invalid. Instead of invalidating the disclaimer, the Court acknowledged the dealer's right to exclude implied warranties and limit remedies for breach of warranty under Kentucky Revised Statutes § 355.2-316 [hereinafter referred to as KRS].[30] The Court referred to section 2-316 of the UCC without any mention of the requirement that the disclaimer be conspicuous, the point which was stressed in *Bayne.*

The Court of Appeals has not always been unwilling to use the "conspicuous" requirements of section 2-316(2). In *Massey-Ferguson, Inc. v. Utley,*[31] the Court applied this provision in order to hold a disclaimer invalid.[32] Where there is breach of express warranty, it is not as essential to find a disclaimer invalid in order to grant the buyer relief. The Court referred to the definition of "conspicuous" in the

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[26] *Id.* This case will be discussed further in reference to the idea of failure of consideration as a basis for rescission.

[27] 282 S.W.2d 349, 350 (Ky. 1955).

[28] *Id.* at 351.

[29] 402 S.W.2d 429 (Ky. 1966).

[30] *Id.* at 431.

[31] 439 S.W.2d 57 (Ky. 1969).

[32] *Id.* at 58. This case involved a breach of implied warranty of fitness of farm machinery purchased by Utley for use on his farm. Utley asserted this warranty as a defense to an action to recover payment for the machinery. Massey-Ferguson's principal argument was that the defense of implied warranty is expressly excluded by the terms of the sales contract.

Code, KRS § 355.1-201(10),[33] noting that this section leaves the final decision of what is conspicuous to the court. In *Utley*, the language expressly excluding implied warranties was on the back of the contract form with a number of other provisions. The exclusionary language was not in larger or contrasting type. There was a heading to the section containing the disclaimer, but there was nothing that indicated a disclaimer was present. The heading merely read "Warranty and Agreement."[34] Under these facts, the Court was willing to hold the dealer to implied warranties despite the attempted disclaimer.

In *Childers & Venters, Inc. v. Sowards*,[35] the Kentucky Court found a disclaimer conspicuous even though it was on the reverse side of the contract. The front of the contract made the sale subject to terms on the reverse side, and the exclusion was in heavier type than the other paragraphs on the back of the contract. While the Court of Appeals has applied the requirement that all disclaimers be conspicuous, it has not been willing to do so without close scrutiny of the contract involved. In addition, the Court did not apply the conspicuousness requirement of the UCC to the *Cox* case, *supra*, involving an automobile dealer's disclaimer of warranty similar to the disclaimer in *Bayne*. Nor did the Court find the disclaimer in *Cox* void on grounds of unconscionability or for reasons of public policy.

Assuming a wronged new car buyer can avoid the disclaimer in the purchase order for his vehicle, he still must overcome the dealer's right to repair[36] in order to be relieved of his obligations in connection with the purchase. The court in *Bayne* found that Nall Motors had a right to repair under UCC § 2-508 but that this right was limited to the correction of *minor* defects. In this circumstance, the defect was "of a highly complex nature with possibilities of damage to other major parts of the vehicle, subjecting the purchaser to risks of future repairs and uncertainty."[37]

In deciding whether a flaw is minor, important considerations include whether the correction would leave no evidence of the prior

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[33] UCC § 1-201(10) reads:
"Conspicuous"; A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals . . . is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court.

[34] 439 S.W.2d 57, 58 (Ky. 1969).

[35] 460 S.W.2d 343 (Ky. 1970).

[36] J. WHITE & R. SUMMERS, *supra* note 7, at 266-70.

[37] Bayne v. Nall Motors, Inc., No. 40609 (D. Iowa, May 16, 1973).

condition nor reduce the value or quality of the vehicle as originally purchased.[38] If a defect indicates that an item is basically of poor quality or could not reasonably be expected to be corrected to the buyer's satisfaction, the seller ought not to be permitted to repair. Another factor is the complexity of the device.[39] Therefore, the effect of a defect on an automobile's entire structure must be considered.

Zabriskie Chevrolet, Inc. v. Smith,[40] adds another element to the question of what is a repairable defect—the effect on the buyer's faith in his purchase. The Court stated:

> For a majority of people the purchase of a new car is a major investment rationalized by the peace of mind that flows from its dependability and safety. Once their faith is shaken, the vehicle loses not only its real value in their eyes, but becomes an instrument whose integrity is substantially impaired and whose operation is fraught with apprehension.[41]

This idea was followed in *Bayne,* and it served the plaintiff's case well in that the possible internal damages done to his car was his reason for refusing to accept the cure as tendered by the dealer.

In automobile warranty cases, another issue may arise as to the burden of identifying the defect claimed. At least one court has maintained that, in order for the plaintiff to recover under the express warranty for replacement of defective parts, he must prove that the malfunction was caused by a defect and also present evidence proving precisely what was wrong with the car.[42] The Court of Appeals of Kentucky has taken a different view. In *Cox Motor Car Co. v. Castle,*[43] it rejected the dealer's claim that the duty was on the buyer to point out what parts were defective. The Court cited the "examination" requirement placed on the seller by the contract as well as the relative abilities of the two parties to determine the defect involved.[44]

Cox involves another aspect of warranty—defects under the automobile dealer's express warranty. In *Cox,* as noted previously, the Court upheld the disclaimer of warranty, but it nevertheless allowed the plaintiff to recover the price of the truck he purchased by finding a breach of express warranty. The Court found that the seller was confronted with a well-founded complaint of a defective condition.

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[38] Comment, *Sales of Personal Property—Breach of Warranty—Repair as a Means of Cure Under Section 2-508 of the Uniform Commercial Code, supra* note 8, at 788.

[39] *Id.* at 789.

[40] 240 A.2d 195 (N.J. 1968).

[41] *Id.* at 205.

[42] Collum v. Fred Tuck Buick, 285 N.E.2d 532, 536 (Ill. App. Ct. 1972).

[43] 402 S.W.2d 429 (Ky. 1966).

[44] *Id.* at 431.

Within a month after the purchase of the truck, the buyer began making complaints to the dealer about instability in the truck's alignment. He made repeated complaints until the truck broke down two years after it was purchased. The seller's actions constituted a breach of express warranty when he refused to respond in good faith to the buyer's reasonable complaints. Since the seller had the obligation to identify the defect, his refusal to recognize that there was a defect caused the Court to consider the whole truck "as one big defective part."[45] This had the same effect as allowing a rescission of the contract. Therefore, "the measure of damages properly would be the cost of replacing the truck with one not defective which would be the same as the difference in market price."[46]

In *Cox* the Court of Appeals also cited KRS § 355.2-719[47] as grounds on which parties to a contract could exclude implied warranties and could limit remedies for breach of warranty.[48] However, the Court did not refer particularly to KRS § 355.2-719(2) which would seem to be grounds for another consumer argument. That subsection qualifies the contracting parties' ability to limit or exclude remedies. It reads, "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Chapter." In situations like *Bayne* and *Cox*, it would seem that the express warranty in the contract fails of its essential purpose to give the buyer protection against unanticipated failure in his vehicle.[49]

Thus far we have looked at two methods of granting an automobile buyer an action for the price of his car. The *Bayne* approach is through rejection of the dealer's disclaimer followed by close scrutiny of the curability of the defect involved. The Court of Appeals in *Cox*, reluctant to discard disclaimer so easily, nevertheless granted the buyer the price through an unusual application of breach of express warranty. The Court's "one-big-defective-part" theory may be the preferable

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[45] *Id.*

[46] *Id.*

[47] UCC § 2-719(1) reads:

Subject to the provisions of subsection (2) and (3) of this section and of § 2-718 on liquidation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

[48] 402 S.W.2d 429, 431 (Ky. 1966).

[49] Riley v. Ford Motor Co., 442 F.2d 670 (5th Cir. 1971). The court held that the express warranty failed in its essential purpose, that is to give the buyer a car free of substantial defect.

approach for a plaintiff in Kentucky, but *Myers v. Land*[50] gives the Kentucky plaintiff another option in certain circumstances. It may be remembered that in *Myers* the Court used the equitable argument of failure of consideration in addition to breach of warranty as a basis for rescinding the contract.[51] This argument is applicable to a case where the purchased article fails to do what it was agreed that it should do in the bargaining between the parties. The Court in *Myers* stated the argument well:

> . . . to sell a man a machine for manufacturing a merchantable product that will not accomplish that purpose at all is a breach of the contract itself rather than a mere breach of warranty, although were such implication of law not excluded, that too would sustain a right of action. If the machine is worthless for the purpose for which it was sold, there is a failure of consideration.[52]

However, *Myer's* applicability to automobile purchase cases is limited to situations in which the car's defect is well beyond inconvenience in operation. The Court of Appeals indicated this in *L. R. Cooke Chevrolet Co. v. Culligan Soft Water Service of Lexington.*[53] There the Court upheld the disclaimer and found no failure of consideration since the plaintiff continued to use the truck despite what he claimed to be a slight "shimmy."[54] The Court distinguished the case from *Myers* by stating:

> Since the equities of the situation do not justify a rescission of the contract, and inasmuch as the sales contract excluded all implied warranties the court should have directed a verdict for the appellant [the dealer].[55]

The fact situation in *Bayne* was very favorable to the plaintiff. There was a possibility of permanent damage, and the case probably could have been decided on the "defective car" theory of *Cox*. By finding the possibly permanently damaged car as a "defect in itself," the court in *Bayne* would not have had to get involved in the issue of the validity of the disclaimer. However, there are situations where it would not be warranted to rule the entire car defective. In these cases a Kentucky court might well uphold a disclaimer and rule for

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[50] 235 S.W.2d 988 (Ky. 1951).
[51] Comment, *Breach of Warranty of Fitness as Failure of Consideration—Myers v. Land*, 42 Ky. L.J. 286 (1953).
[52] Myers v. Land, 235 S.W.2d 988, 991 (Ky. 1951).
[53] 282 S.W.2d 349 (Ky. 1955).
[54] *Id.* at 351.
[55] *Id.*

the dealer. The Kentucky Court of Appeals has not construed the conspicuousness requirement as to disclaimers as broadly as the court in *Bayne,* nor has it followed the same theories on the issue of rescission versus repair. Therefore, while a Kentucky buyer of a "lemon" may be able to recover the price of his car, the theory of his recovery may have to be based on breach of express warranty.

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