UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DARLING'S d/b/a DARLING'S BANGOR FORD,	)	
	)	
PLAINTIFF	)	
	)	
v.	)	**CIVIL NO. 95-398-B-H**
	)	
FORD MOTOR COMPANY,	)	
	)	
DEFENDANT	)	

RECAPITULATION OF PREVIOUS RULINGS AND NEW FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this lawsuit, Darling's Bangor Ford, a motor vehicle dealer, and Ford Motor Company, a motor vehicle manufacturer, are at odds. The source of their conflict is a Maine statute dictating how manufacturers like Ford are to pay dealers like Darling's for warranty work. The statute sounds simple enough, and the legislators who adopted it probably thought it was pretty straightforward: for both parts and labor, a manufacturer must pay a dealer "the retail rate customarily charged by that [dealer] for the same parts [or labor] when not provided [or performed] in satisfaction of a warranty." 10 M.R.S.A. § 1176. The legislative history demonstrates that legislators believed this statute would protect ordinary Maine car and truck owners with vehicles no longer under warranty. Legislators believed these Mainers were unfairly paying extra for nonwarranty repairs to subsidize large manufacturers like Ford

who could use their economic power to force Maine dealers to accept unreasonably low reimbursement prices for warranty repairs.

The devil, however, is in the details. There are thousands of different parts and labor procedures, and Ford has thousands of dealers around the country, pays for thousands of warranty repairs and wants to treat all its dealers uniformly. A manufacturer needs a system for paying a dealer that can assure the manufacturer that it is not being overcharged. The dealers, in turn, are in a very competitive business where pricing changes frequently, new parts and procedures turn up on an annual basis with new vehicle models, some parts and repair procedures are seasonal and the dealers' primary need is to sell vehicles and servicing at a low overhead. The dealers need a system that is easy to implement with little time and paperwork.

In this context, the "simple" words of the statute take on an unexpected complexity. What is the "same" part? A left headlight versus a right headlight? A right headlight on a 1995 model versus a 1996 model, or a right headlight on two different models in the same year? What is "customarily" charged? If a part is newly introduced, how can there be a "customary" nonwarranty charge? If the dealer has sold thirty-five headlights this year, but not this particular one on this particular model, is its price for the thirty-five headlights the one "customarily" charged for this one? Does a sale over-the-counter to a do-it-yourselfer count, or only what the dealer charges when it installs the part? If the dealer provides discounted pricing to customers who have fleets of vehicles they bring in for service and

repairs, is that a "retail rate customarily charged"? If the dealer has not done an air conditioning repair in a year, does it have a rate that it "customarily" charges?

A manufacturer and dealer who were trying to make the statute work could resolve some of these issues by compromise. Here, however, Ford opposed the statute before it was even enacted[1] and has continued to demonstrate its distaste for it, both in litigation and in the way it has told dealers it will implement it. Darling's in turn has badgered Ford over the statute, changing its position on how to interpret it as it serves its purposes, filing a myriad of small claims, mailing Ford boxes of materials it says support its claims (but leaving it to Ford to sort them out), and ultimately asking this court to dictate to Ford what kind of claims system to implement.

Previous court decisions have created new problems as they resolved old ones. The constitutional issues Ford has raised, for example, have been resolved. But previous federal and state decisions have dismissed some dealers' claims without prejudice on the ground that the dealers (including Darling's) had not previously made a "particularized claim" to the manufacturer, and the First Circuit has referred in dictum to the statute as calling for a "match" between the warranty part and the comparison part. Now the parties add those judicial terms to the list of statutory terms over whose meaning they disagree.

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[1] See Ford's letter, dated April 30, 1991, to the Maine Legislature expressing opposition to the proposed amendment and emphasizing manufacturers' need for uniform reimbursement policies. Public Hearing on L.D. 1235 before the Business Legislation Committee, 115th Leg., 1st Regular Session (April 30, 1991), on file at the Law and Legislative Reference Library, Augusta, Maine.

As a result, Ford and Darling's disagree on just about everything. I had hoped to move them toward a mutual compromise by ruling from the bench—in stages over the months—on the legal issues and then attempting to address the larger factual issues, always in the optimistic belief the parties might ultimately conclude they could accomplish more by reasoning together than by running up legal fees. It is apparent, however, that my hopes were in vain and that this matter will be litigated down to the last issue and then appealed. Consequently, I now recapitulate my earlier bench rulings, together with my new factual findings and conclusions of law arising out of a bench trial held on specific issues from November 17 to 20, 1997, with closing arguments on December 30, 1997. I then invite the parties' assistance in framing certain issues for certification to the Maine Law Court for a definitive ruling on matters of state law.

I. BACKGROUND

Ford manufactures cars and trucks and sells them nationwide through a network of franchise dealers. A uniform franchise agreement, called the Sales and Service Agreement ("Agreement"), defines the manufacturer-dealer relationship. Ford offers a warranty with all new vehicles and requires its dealers to provide warranty repairs and service to customers at Ford's expense.

Under Ford's nationwide warranty reimbursement system (Ford calls it DWE—direct warranty entry), dealers submit payment requests to Ford via a computerized procedure that reimburses them automatically according to formulas Ford has created. (The reimbursement

occurs through a running account between Ford and the dealer, automatically crediting reimbursement amounts to a dealer's monthly Parts Statement, and debiting it when the dealer buys parts from Ford.) With regard to parts, Ford's practice has been to reimburse its national network of dealers at a uniform rate of cost plus 30 to 40 percent, depending on the model year. With regard to labor operations, Ford takes each individual dealer's documented average hourly labor rate and multiplies that amount by the uniform time Ford allots to a given labor operation. Ford's computerized system does not take into account the actual amount that a particular dealer charges or would charge to someone other than Ford for a given part or labor operation.

The State of Maine regulates warranty reimbursement levels by statute. 10 M.R.S.A. § 1176.[2] Since 1980, section 1176 has required manufacturers to reimburse dealers for labor

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[2] Stated in full, § 1176 provides that:

> If a motor vehicle franchisor requires or permits a motor vehicle franchisee to perform labor or provide parts in satisfaction of a warranty created by the franchisor, the franchisor shall properly and promptly fulfill its warranty obligations, in the case of motor vehicles over 10,000 pounds gross vehicle weight rating, shall adequately and fairly compensate the franchisee for any parts so provided and, in the case of all other motor vehicles, shall reimburse the franchisee for any parts so provided at the retail rate customarily charged by that franchisee for the same parts when not provided in satisfaction of a warranty. Further, the franchisor shall reimburse the franchisee for any labor so performed at the retail rate customarily charged by that franchisee for the same labor when not performed in satisfaction of a warranty; provided that the franchisee's rate for labor not performed in satisfaction of a warranty is routinely posted in a place conspicuous to its service customer. A franchisor is not required to pay the price charged by the dealer to retail customers for parts of systems, appliances, furnishings, accessories and fixtures of a motor home as defined in Title 29-A, section 101, subsection 40 that are designed, used and maintained primarily for nonvehicular residential purposes. Any claim made by a franchisee for compensation for parts provided or for reimbursement for labor performed in satisfaction of a warranty must be paid within 30 days of its approval. All the claims must be either approved or disapproved within 30 days of their receipt. When any such claim is disapproved, the franchisee that submitted it must be notified in writing of its disapproval within

(continued...)

provided in the course of warranty work "at the retail rate customarily charged by that franchisee for the same labor when not performed in satisfaction of a warranty; provided that the franchisee's rate for labor not performed in satisfaction of a warranty is routinely posted in a place conspicuous to its service customer." 10 M.R.S.A. § 1176 (1980). In 1991, the Maine legislature turned its attention to parts and amended section 1176 "to require that dealers be compensated for parts in the same manner as labor. . . ." P.L. 1991, ch. 328, § 1176; L.D. 1235, Statement of Fact (115th Legis. 1991). The statute now provides that manufacturers must reimburse dealers for parts "at the retail rate customarily charged by that franchisee for the same parts when not provided in satisfaction of a warranty." 10 M.R.S.A. § 1176.

A manufacturer has thirty days to approve or disapprove a claim for warranty reimbursement. "When any such claim is disapproved, the franchisee . . . must be notified in writing of its disapproval within that period, together with the specific reasons for its

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[2] (...continued)

> that period, together with the specific reasons for its disapproval. No franchisor may, by agreement, by restriction upon reimbursement, or otherwise, restrict the nature or extent of labor performed or parts provided so that such restriction impairs the franchisee's ability to satisfy a warranty created by the franchisor by performing labor in a professional manner or by providing parts required in accordance with generally accepted standards.
>
> In any claim that is disapproved by the manufacturer, and the dealer brings legal action to collect the disapproved claim and is successful in the action, the court shall award the dealer the cost of the action together with reasonable attorney fees. Reasonable attorney fees shall be determined by the value of the time reasonably expended by the attorney and not by the amount of the recovery on behalf of the dealer.
>
> It is unlawful for a franchisor, manufacturer, factory branch, distributor branch or subsidiary to own, operate or control, either directly or indirectly, a motor vehicle warranty or service facility located in the State except on an emergency or interim basis or if no qualified applicant has applied for appointment as a dealer in a market previously served by a new motor vehicle dealer of that manufacturer, factory branch, distributor branch or subsidiary's line make.

disapproval." Id. A manufacturer must pay an approved claim within 30 days of the date of approval. Id.

II. THRESHOLD RULINGS
[With Two Exceptions, Resolved Earlier From the Bench on the Undisputed Record]

A. CONSTITUTIONALITY/COLLATERAL ESTOPPEL

In Acadia Motors, Inc. v. Ford Motor Co., 844 F. Supp. 819 (D. Me. 1994), Ford argued, among other things, that applying the 1991 legislative amendment concerning parts pricing to Ford's pre-existing contracts with dealers (the Ford/Darling's agreement was signed in 1989) violated the Contracts Clause of the Maine and United States Constitutions. See M.R.S.A. Const. art. I, § 11; U.S. Const. art I, § 10. Judge Brody squarely addressed this retroactivity issue. He ruled against Ford, holding "that applying the 1991 amendment to § 1176 to Ford's contracts with dealers entered into prior to 1991 does not violate the Contract Clause of either the state or federal constitution." Id. at 828.[3] The First Circuit noted that Ford neglected to appeal the constitutional ruling. Acadia Motors, Inc. v. Ford Motor Co., 44 F.3d 1050, 1053 n.3 (1st Cir. 1995). Accordingly, Judge Brody's decision

[3] I note that when she was a trial judge, Justice Saufley considered the retroactivity issue in American Honda Motor Co. v. Darling's Honda/Nissan, Nos. 95-39 & 96-668, slip op. at 4-11 (Me. Super. Ct. July 27, 1997). Justice Saufley ruled that the Legislature did not intend the 1991 amendment to apply retroactively. Given this holding, she did not reach the constitutional issue, but noted that if she had, she would have reached the same conclusion as Judge Brody: "If applied retroactively, even if § 1176 substantially impaired the plaintiffs' rights, there are significant and legitimate state interests which are appropriately and reasonably served by the adjustment of the plaintiffs' contracted rights." Id. n.12 (citations omitted). Ford did not argue legislative intent in this case.

adverse to Ford on the constitutional issue is the final decision for purposes of collateral estoppel analysis.

The First Circuit has "formally adopt[ed] the rule that federal law of res judicata governs the effect of a prior federal judgment in a diversity case." Johnson v. SCA Disposal Servs., Inc., 931 F.2d 970, 974 (1st Cir. 1991). Federal law "bars relitigation of any factual or legal issue that was actually decided in previous litigation 'between the parties, whether on the same or a different claim.'" Dennis v. Rhode Island Hosp. Trust Nat'l Bank, 744 F.2d 893, 899 (1st Cir. 1984) (citation omitted). Specifically, "(1) the issue sought to be precluded must be the same as that involved in the prior action; (2) the issue must have been actually litigated; (3) the issue must have been determined by a valid and binding final judgment; and (4) the determination of the issue must have been essential to the judgment." Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 30 (1st Cir. 1994). Judge Brody's ruling on the constitutional question meets all four prongs of the Grella test. As a result, Ford is collaterally estopped from relitigating this constitutional issue on parts pricing.

Ford argues, however, that any preclusive effect of Judge Brody's decision on the constitutional issue is limited to parts and that it is free to relitigate the issue as to labor claims. Hr'g Tr. at 29 (Jan. 9, 1997). The labor provision of the statute has been in effect since 1980. Ford did not enter into a franchise agreement with Darling's until 1989. Therefore, Ford has no constitutional argument as to labor.

B. APPLICABILITY OF SECTION 1176 TO SUBLET REPAIRS

In some circumstances, vehicles under warranty require repairs or service that a particular dealer cannot perform. In those instances, the dealer sends the vehicle to another shop for the required repairs or service. Darling's (and apparently the industry) calls these "sublet repairs." Darling's argues that section 1176 applies to sublet repairs because Ford requires Darling's to ensure that all warranty repairs are made. Darling's charges a customer a 25% markup over what Darling's pays for the sublet. It claims that section 1176 entitles it to recover this entire amount from Ford.

Under Maine rules of statutory interpretation, "courts must give the unambiguous wording of a statute its plain and ordinary meaning." Acadia Motors, 44 F.3d at 1055 (citing Stanley v. Tilcon Maine, Inc., 541 A.2d 951, 952 (Me. 1988)). By its language, section 1176's application is limited to cases in which "a motor vehicle franchisor [Ford] requires or permits a motor vehicle franchisee [Darling's] to *perform* labor or *provide* parts in satisfaction of a warranty. . . ." 10 M.R.S.A. § 1176 (emphasis added). Sublet repairs are, by definition, repairs in which Darling's does not perform the labor and does not provide the parts. Applying Maine's rule of statutory construction to the emphasized language, I conclude that section 1176 does not extend to sublet repairs. As a result, Ford is entitled to judgment on Count I of its Counterclaim.

C. APPLICABILITY TO RECALL/OWNER NOTIFICATION

[This Ruling Occurred at Trial After the Plaintiff Had Been Fully Heard Under Rule 52(c)]

Apart from requiring warranty service on Ford cars and trucks, Ford also requires a dealer to provide service in connection with any vehicle recalls and any optional repairs under an owner notification program, in both cases even after the express warranty has expired. Darling's argues that recall/owner notification repairs result from an implied warranty of merchantability and are therefore covered by section 1176. (Initially, Darling's also asserted that section 1176 covered reimbursement claims for service performed under an Extended Service Plan (ESP), a service contract that the owner of any car can purchase from a car dealer. Darling's withdrew its ESP claims with prejudice at trial. Trial Tr. at 479 (Nov. 19, 1997).)

Section 1176 sets the reimbursement standards for parts and labor provided "in satisfaction of a warranty *created by the franchisor*." 10 M.R.S.A. § 1176 (emphasis added). Implied warranties, on the other hand, arise, if at all, by operation of law. Thus, the plain meaning of the limiting language "created by the franchisor" does not extend to implied warranties. The Legislature has explicitly recognized the difference between express warranties (those created by agreement) and implied warranties (those created by law). Indeed, in a study ordered by the Legislature in the spring of 1979, the Joint Standing Committee on Business Legislation, in addressing whether used car dealers should be able to disclaim the implied warranty of merchantability, stated that "[i]mplied warranties such

as the warranty of merchantability exist apart from and in addition to any express warranties which are created by agreement between a manufacturer or retailer and a buyer. Implied warranties are created by statute instead." Final Report of the Joint Standing Committee on Business Legislation, on its study pursuant to joint order H.P. 1459, at 5 (Jan. 25, 1980).

Darling's also contends that Ford's definition of "warranty," as set forth in its Warranty and Policy Manual, expressly includes recalls, thereby bringing them under the statute. Darling's points to a provision of the Manual bearing the heading "Warranty Responsibility," which states that "dealers are required to provide warranty and policy service, (e.g., warranty, ESP, and *service recalls*) for all vehicles they are franchised to sell." Ex. 196, at 2.0-9 (emphasis added). Initial confusion arises because Ford uses a single heading—"Warranty Responsibility"—to designate a provision that deals with two different types of service: warranty service and policy service. But elsewhere, Ford draws a clear distinction between its warranty and its policy programs. In the definition section of Ford's Warranty and Policy Manual, for example, a warranty is defined as "[a] *written* statement made by Ford to the buyer of a new Ford vehicle." Id. at 1.0-6 (emphasis added). In contrast, a "policy" is defined as "[a] Company program which pays all or part of certain repairs *not* covered by warranty." Id. at 1.0-5 (emphasis added). In addition, the Ford Sales and Service Agreement Standard Provisions state that "[t]he Company shall from time to time establish . . . the warranty to the owner applicable to each VEHICLE. There shall be NO OTHER WARRANTY, express or implied, including any warranty or MERCHANTABILITY OR FITNESS. . . ." Ex. 2, p. 5, ¶ 2(i). The conclusion could not be

clearer: recall and owner notification programs are not warranties created by Ford and are not covered by section 1176.

At trial, I reserved judgment on whether Ford had waived this argument as to nonwarranty recalls that occurred within the express warranty period. In oral argument at both the October hearing and at trial, Ford's lawyer agreed that recall repairs performed within the warranty period would be covered by section 1176. Hr'g Tr. at 53 (Oct. 29, 1997) ("Some recalls are done during the warranty period. And those recalls would be within the scope of section 1176, we think, they would—any work done by Darling's under recalls of vehicles done during a warranty period would presumably be included in its claims."); Trial Tr. at 474-75 (Nov. 19, 1997) ("[W]e would submit that work done as a result of recalls during . . . the express warranty period is covered by 1176, not because it's done during the course of a recall, but simply because the vehicle is being brought back to the dealer during the express warranty period."). Moreover, I noted twice on the record, in the course of the October hearing that I understood Ford's position to be that repairs or service performed within the warranty period were covered by section 1176 even if they were done in connection with a recall. Hr'g Tr. at 54 & 55 (Oct. 29, 1997). Ford confirmed this interpretation. Id. at 54.

After initially reiterating this position at trial, Ford sought to retract its statement. Trial Tr. at 479 (Nov. 19, 1997) ("I'd like to correct the statement that I made. . . . [A] recall during the express warranty period would not be deemed covered by the express warranty."). Ford's new "position is that warranty work is limited to *defects* that manifest themselves and

that are presented by the buyer during the warranty period." Trial Tr. at 482 (Nov. 19, 1997) (emphasis added), citing Walsh v. Ford Motor Co., 588 F. Supp. 1513 (D.C.D.C. 1984). Darling's argues that I should not permit Ford to retreat from its earlier statements.

The issue is close. Ordinarily, for trial efficiency purposes, I hold lawyers to the positions they take initially. But after reviewing the post-trial written submissions I authorized the lawyers to make, I conclude that there is no indication here that Ford misstated its position deliberately to gain a tactical advantage. Conversely, although it first claimed surprise at trial, Darling's has not shown in its post-trial submission that Ford's change of position caused Darling's any prejudice to its ability to present its case and arguments. On the contrary, Darling's has consistently maintained that the question whether the warranty reimbursement statute covers service recalls is one of law and not of fact. A judge may permit pleadings to be amended to reflect the issues as actually tried. Fed. R. Civ. P. 15(b). Analogously here, I conclude that Ford did not irretrievably waive its position on recalls during the warranty period.

D. MEANING OF "RETAIL RATE" FOR LABOR

The statute requires manufacturers to reimburse dealers for labor provided in the course of warranty work "at the retail rate customarily charged by that franchisee for the same labor when not performed in satisfaction of a warranty; provided that the franchisee's rate for labor . . . is routinely posted in a place conspicuous to its service customer." 10 M.R.S.A. § 1176.

Ford advocates a very narrow reading of the term "retail rate," and urges that retail rate means only hourly rate. Ford's labor reimbursement practice is to take an individual dealer's hourly rate for labor and then multiply that rate by a uniform time determined by Ford. Under Ford's proposed reading, so long as it uses an individual dealer's posted hourly rate as the multiplying factor in its reimbursement calculation, it complies with section 1176 even if the total amount that it reimburses a dealer for warranty labor bears no relation to the amount that the dealer actually would charge a nonwarranty customer.

Darling's argues for a broader definition of "retail rate." It contends that the term "retail rate" means the total labor amount a dealer would charge to a nonwarranty customer for the same job, regardless of whether the job was billed at actual time, or according to a flat rate.

The statutory term "retail rate" is facially ambiguous on this question of whether flat rate pricing is included. Maine law directs that courts interpreting ambiguous statutory language "'look beyond the words of the statute to its history, the policy behind it, and other extrinsic aids to determine legislative intent.'" Arsenault v. Crossman, 696 A.2d 418, 421 (Me. 1997) (quoting State v. Fournier, 617 A.2d 998, 1000 (Me. 1992). Fortunately, the legislative commentary on section 1176 and related statutes clarifies the term "retail rate."

Enacted in 1975 as part of "An Act to Regulate Business Practices Between Motor Vehicle Manufacturers, Distributors and Dealers," P.L. 1975, ch. 573 §§ 1171-1186 (codified as amended at 10 M.R.S.A. §§ 1171-1186 (1997)), the original version of section 1176 did not use the term "retail rate"; it merely required a manufacturer to "adequately and

fairly compensate each of its motor vehicle dealers for labor and parts." P.L. 1975, ch. 573, § 1176. The term "retail rate" first appeared in 1979. P.L. 1979, ch. 698, § 1176. In its study, the Joint Standing Committee on Business Legislation expressly noted that "[f]or many years . . . automakers' superior bargaining power ha[d] enabled them to coerce dealers into accepting reimbursement *at a rate* significantly below what dealers routinely charge ordinary retail customers for non-warranty repairs [the result being] that retail customers pay inflated labor rates for non-warranty repairs and thereby subsidize the automakers. . . ." Final Report of the Joint Standing Committee on Business Legislation, on its study pursuant to joint order H.P. 1459, at 4 (Jan. 25, 1980) (emphasis added). The legislative concern was labor charges in general; there was no suggestion that the concern was limited to hourly rates. The Committee concluded:

> the only equitable method of express warranty reimbursement is reimbursement at the regular *retail rates*. Further, no automaker ought to be permitted to pressure its dealers into accepting less. . . .
>
> We propose very simply that an automaker be required to reimburse a dealer for labor at the *retail rate* customarily charged by the dealer for nonwarranty repairs. . . . There is only one condition that needs to be imposed to ensure that the dealer's *rate* is bona fide—it should be routinely posted in a conspicuous place.

Id. at 4-5 (emphasis added). The current "retail rate" language of section 1176, enacted in 1980, adopts the Committee's proposed amendment. P.L. 1979, ch. 698, § 1; Comm. Amend. A to L.D. 1878, No. H-877 (109th Legis. 1980).

To implement the Committee's conspicuous posting proposal, that same 1980 legislation required dealers to notify consumers of their labor pricing practices. P.L. 1979, ch. 698, § 4, 29 M.R.S.A. § 2605 (currently codified at 29-A M.R.S.A. § 1805). Specifically, it required dealers not only to post their hourly charges for labor, but also to notify consumers about "flat rate" pricing. A separate provision defined "flat rate" as "any method of calculating charges for labor that is not based upon the amount of time actually spent repairing a motor vehicle." Id., 29 M.R.S.A. § 2601(2) (currently codified at 29-A M.R.S.A. § 1801(2)) (The current language reads: "'Flat rate' means a method of calculating charges for labor that is based on the specific repair done and not on the amount of time actually spent on that repair."). The accompanying Statement of Fact stated that the purpose of the posting requirement is to "inform[] customers of their legal rights and the shop's rates," id. at 5,— in context, obviously encompassing both flat and hourly rates. Indeed, the original draft of the statute included language that the franchisor should reimburse the franchisee "in an amount equal to the *retail price* customarily charged by that franchisee. . . ." L.D. 1878 (109th Legis. 1980) (emphasis added). A Committee Amendment to the original draft, described as only "a technical change," replaced the term "price" with the term "rate." Comm. Amend. A to L.D. 1878, No. H-877, Statement of Fact (109th Legis. 1980) at 5. (The interchangeability of the terms "rate" and "price" is further reflected in use of the same term "rates" to encompass the pricing of parts when the statute was amended in 1991.)

In amending the provision in 1989, the accompanying Statement of Fact stated: "[t]his bill ensures that automobile repair customers understand *all repair charges, including*

whether they are being charged an hourly labor rate or a flat rate." L.D. 1044, § 1, 29 M.R.S.A. § 2605 (114th Legis. 1989) (currently codified at 29-A M.R.S.A. § 1805) (emphasis added). Finally, the most recent amendment requires dealers to add language to their signs that states: "PLEASE ASK US WHETHER WE WILL CHARGE YOU BY THE HOUR OR BY A FLAT RATE." P.L. 1997, ch. 221, § 1 (118th Legis. 1997).

The legislative history of section 1176 and the related statutes makes apparent that the Legislature did not share Ford's narrow definition of the term "retail rate." The general purpose behind the 1980 legislation was to ensure that in reimbursing a dealer for labor, a manufacturer would pay the same amount that a nonwarranty customer would pay, whether the total cost was determined according to an hourly method or otherwise. See also Darling's Bangor Ford v. Ford Motor Co., Nos. 94-SC-370 & 371, slip op. at 5 (Me. Dist. Ct. Mar. 7, 1995) (Hjelm, J.) ("That purpose is to ensure that franchisees receive the same amount of compensation for warranty work as they receive for non-warranty work."); American Honda Motor Co. v. Darling's Honda/Nissan, Nos. 95-39 & 96-668, slip op. at 16 (Me. Super. Ct. July 27, 1997) (Saufley, J.) ("[T]he phrase 'retail rate customarily charged' means the total amount charged for labor for the repair, and not merely the hourly charge component of the labor costs."). I conclude that the term "retail rate," as used in § 1176 is not limited to a dealer's hourly rate, but refers to the total price that nonwarranty customers pay for the same

labor operation. Ford's national procedure for warranty labor reimbursement for Maine dealers, therefore, has never complied with the requirements of section 1176.[4]

E. MEANING OF "ROUTINELY POSTED IN A PLACE CONSPICUOUS TO ITS SERVICE CUSTOMER"

[Based in Part on Findings of Fact From the Evidence at Trial]

When the Maine Legislature amended section 1176 to require manufacturers to reimburse dealers for warranty labor at retail rates, it imposed a condition "to ensure that the dealer's rate is bona fide," Final Report of the Joint Standing Committee on Business Legislation, on its study pursuant to joint order H.P. 1459, at 4 (Jan. 25, 1980): specifically, "the [dealer's] rate for labor not performed in satisfaction of a warranty [must be] routinely posted in a place conspicuous to its service customer." P.L. 1979, ch. 698, § 1; Comm. Amend. A to L.D. 1878, No. H-877 (109th Legis. 1980) (currently codified at 10 M.R.S.A. § 1176). The Legislature even provided the text for the notice to be posted. The current statute provides that "[t]he following form must be used":

> "NOTICE TO OUR CUSTOMERS
> REQUIRED UNDER STATE LAW
>
> Before we begin making repairs, you have a right to put in writing the total amount you agree to pay for repairs. You will not have to pay anything over that amount unless you agree to it when we contact you later.

[4] Ford also seems to suggest that a "flat rate" can only be an actual set price, and not a fixed number of hours by which the hourly rate is multiplied to generate the price. Def.'s Trial Br. at 5 n.3 (Nov. 3, 1997). That is a distinction without a difference.

> Before you pay your bill, you have a right to inspect any replaced parts. You have a right to take with you any replaced parts, unless we are required to return the parts to our distributor or manufacturer.
>
> We can not install any used or rebuilt parts unless you specifically agree in advance.
>
> You cannot be charged any fee for exercising these rights.
>
> WE CHARGE $ PER HOUR FOR LABOR.
> (We round off the time to the nearest .)"
>
> 2. Flat rate. The notice must also contain the following if it applies:
>
> "We also charge a flat rate for some repairs. Our service manager will explain what a flat rate is and show you how much it may cost you. A flat-rate charge may not match the time actually spent repairing your vehicle. PLEASE ASK US WHETHER WE WILL CHARGE YOU BY THE HOUR OR BY A FLAT RATE."
>
> 3. Availability of guide. The notice must also contain the following:
>
> "The current edition of the National Automobile Dealer's Association Official Used Car Guide New England Edition is available for your review upon request."

29-A M.R.S.A. § 1805.

Darling's has hung a sign that complies with the requirements of section 1805 in its service drive-through since John Darling purchased the dealership in 1989. Trial Tr. at 333 (Nov. 18, 1997). The dealership has amended the sign periodically as the requirements of section 1805 or Darling's hourly labor rate have changed. Id. at 334-35. Beginning in early July 1993, in addition to the sign, Darling's installed a shelf on the wall underneath its sign

to make available to customers copies of other materials it uses for flat rate labor pricing—the Motors Manual, Darling's' service menus for cars and trucks, and Darling's' retail pricing guides. Id. at 333.

Ford takes the view that placing the manual and other published pricing information on a shelf does not constitute "posting." Relying on language from a 1947 Customs Court case which states that "[t]he verb 'to post' has a well-defined meaning which carries with it the idea or suggestion of affixing a notice to an object in a vertical manner at such height and in such place that the eyes of the public will readily see it," Hutchinson v. United States, 18 Cust. Ct. 64, 67 (Cust. Ct. 1947), Ford apparently contends that Darling's cannot recover under section 1176 unless it "posts" vertically its charge for each and every labor operation it performs. But see Frederick Wholesale Corp. v. United States, 585 F. Supp. 640, 643 n.5 (Ct. Int'l Trade 1983) ("The term 'posting' can be broadly construed and has not been interpreted to require vertical affixation.") (internal citation omitted).

I find that Darling's' labor rate posting practices meet the requirements of section 1176. The statutorily approved sign has been routinely and conspicuously posted throughout the time period relevant to this lawsuit. Thus, where hourly rates are concerned, it is clear that Darling's meets the statute's posting requirement. Where flat rates are concerned, I do not accept Ford's unduly literal interpretation of the statute. The Maine Legislature, in enacting its "Notice" statute, did not require dealers to list on the posted sign the specific flat-rate prices on particular jobs; its statutory notice merely requires the dealer to inform customers of the flat-rate method of pricing and direct customers to a service manager for

further information. Darling's' posting practices comply with this requirement and, indeed, supply customers with more information than the statute requires. I am therefore persuaded that Darling's' posting practices satisfy the letter and spirit of section 1176's posting requirement. It will be open to the special master, however, to determine whether—on particular parts or labor procedures—it failed to do so or did so incorrectly if Ford presents evidence accordingly. In that event, no recovery (beyond what Ford paid under DWE) for that transaction would be permitted under the statute since Darling's would have failed to satisfy the prerequisite condition.

F. MEANING OF "RETAIL RATE CUSTOMARILY CHARGED FOR THE SAME PARTS"

Section 1176 provides that a manufacturer "shall reimburse the [dealer] for any parts . . . at the retail rate customarily charged by that [dealer] for the same parts when not provided in satisfaction of a warranty." 10 M.R.S.A. § 1176. Ford claims that this language imposes a requirement on Darling's to substantiate its warranty parts reimbursement claims by presenting proof of an actual transaction in which Darling's sold an identical part to a nonwarranty retail customer within the previous six months. Ford claims that in all other cases it, as a manufacturer, is free to set all reimbursement rates.

The parts issue is a difficult one, and I address its components one at a time.

(1) Is the provision all-inclusive?

Ford maintains that section 1176 governs warranty reimbursement only if a dealer has previously sold (within the previous six months) the particular part to a nonwarranty retail customer. Otherwise, it argues, Ford's Service Labor Time Standard Manual controls on pricing questions. The statutory language, however, makes the statutory rate the only rate—it applies to "any parts." For parts on heavy vehicles, the statute requires that the manufacturer "shall adequately and fairly compensate the [dealer]." 10 M.R.S.A. § 1176. There are no exceptions to that standard and no room in the case of heavy vehicles for the argument that Ford's prices must control. For parts on lighter vehicles—the subject of this lawsuit—the standard is the "retail rate customarily charged by that [dealer] for the same parts" in nonwarranty work. Id. There is likewise no "default" provision in this part of the statute to bring the private manufacturer-dealer contract into effect for pricing whenever a dealer cannot present an invoice proving a nonwarranty sale of the identical part within the previous six months. The legislative objective I have recounted earlier explains the reason for this all-encompassing language. To exempt parts from coverage when a dealer could not prove a matching nonwarranty sale would undercut the legislative objective of counteracting the manufacturers' economic leverage on pricing. I conclude that section 1176 governs the whole universe of warranty reimbursement claims for parts the dealer provides.

(2) Does the Statutory Language or Acadia Motors Require Dealers to "Match" Each Claim for Parts Reimbursement With a Retail Sale of the Identical Part?

Ford nevertheless contends that both the statute and the First Circuit's Acadia Motors decision require dealers to substantiate each claim for warranty reimbursement for a given part with proof of an exactly matching nonwarranty retail sale of the same part within the last six months. (Under Ford's current reimbursement procedures, a dealer may not establish a retail rate for, say, headlights and expect to be reimbursed at that rate for all headlights it uses in warranty repairs.) To support this "matching" requirement, Ford cites the statutory language—"the same parts"—and language from the First Circuit's decision in Acadia Motors stating that the 1991 amendment to section 1176 "requires a match between the warranty part and the part actually sold by that particular dealer to a non-warranty customer." Acadia Motors, 44 F.3d at 1052. (I learned at trial that Ford's current position is directly at odds with Ford's initial interpretation of the statute. Its first instruction to dealers in 1992 was that it would base the markup on an *average* of 300 parts transactions.)

The disputed statutory language, "retail rate customarily charged . . . for the same parts," does not on its face require that there previously have been an actual nonwarranty sale of a given part; rather, it requires a determination of what the dealer would *customarily* charge a nonwarranty customer for such a part, whether the part has previously been sold or not.

The First Circuit's full statement in Acadia Motors was:

> The statute requires a match between the warranty part and the part actually sold by that particular dealer to a non-warranty customer. For example, a particular dealer's profit margin on the retail sale of a headlight cannot be used to determine the appropriate reimbursement percentage when the dealer, or another dealer, replaces a water pump under warranty.

Id. The First Circuit's headlight/waterpump example gives substance to its abstraction. Of course a dealer who marks up headlights 25% and waterpumps 150% cannot charge Ford a 150% markup on a headlight. That is the meaning of the quoted term "match." The phrase "actually sold," on the other hand, comes out of nowhere. It is language not in the statute, is inconsistent with the statutory goal, was not briefed as the correct way to interpret the Maine statute,[5] and is not necessary to the First Circuit's holding. I conclude that it is nonbinding dictum. (If I am wrong, the First Circuit—or the Law Court[6]—will need to tell us when such a matching sale must take place—one year before the warranty sale? two years? three years? one day after the warranty sale? one year after the warranty sale, but before the lawsuit?—and what happens if there is no nonwarranty sale—e.g., the part is brand new with a new model?) What the statute requires is determination of the retail rate customarily charged for the part in question whether it has yet been the subject of a

[5] The closest Ford's appellate brief came was in generalizing about statutes in a range of states—statutes that "defy simple generalization." Brief for Appellant at 3, Acadia Motors, Inc. v. Ford Motor Co., 44 F.3d 1050 (1st Cir. 1995) (Nos. 94-1335 & 94-1450). In describing state statutes that adopt a "retail-equivalent formulation" (including Maine), Ford simply asserted that unlike its own simple cost-plus formula, they were "premised on the use of a particular part in a warranty repair and a corresponding sale of the same part to a paying customer." Id. at 4. Nowhere did Ford advance this as a matter of Maine statutory interpretation.

[6] Although binding on me, the Acadia Motors case is not binding on the Law Court in a certification.

nonwarranty sale or not. That can be proved by actual nonwarranty sales;[7] it can also be proved by demonstrating a practice of uniform markup for all parts or some other type of pricing practice. But the statute contemplates that the determination will be made for each part—there is no exception.

III. NOVEMBER 1997, BENCH TRIAL

Under my Trial Management Order of August 19, 1997, as amended September 16, 1997, the parties were to address these issues at a November 1997, bench trial: (1) Was Darling's use of the Motors Manual to price labor illegal or impermissible? (2) Are any claims barred by claim preclusion? (3) Did Darling's properly present its claims to Ford or did it fail to file claims or use Ford's procedures and, if so, was Darling's legally required to comply with Ford's procedures? (4) Are certain claims barred by a failure to present a reasonably particularized claim to Ford within the applicable statute of limitations? (5) Did Darling's actually have a "retail rate customarily charged" for parts and labor during the relevant time periods? The first issue was resolved against Ford on a proffer and the second

[7] The parties disagree over what sales qualify as retail sales. Darling's argues that over-the-counter (OTC) sales of parts to people who repair their own vehicles are retail sales. Ford disagrees. Ford argues that sales of parts to fleet customers qualify as retail sales. Darling's disagrees. Nothing in the statutory language "retail rate . . . when not provided in satisfaction of a warranty," 10 M.R.S.A. § 1176, would exclude OTC or fleet sales from the universe of retail sales. I therefore rule that both OTC and fleet sales are retail sales under the statute. But the statute requires reimbursement at "customarily charged" retail rates. Thus, the special master will need to ensure that in seeking reimbursement for a warranty part sold to an OTC customer, Ford reimburses Darling's at the retail rate Darling's customarily charges to OTC customers for nonwarranty parts. Likewise, if Darling's claims reimbursement for warranty parts and labor provided to a fleet customer, the special master must ensure that Ford reimburses Darling's at the retail rate that customarily applies to fleet customers for nonwarranty work.

issue by summary judgment. I summarize those rulings first, then proceed to my findings of fact and conclusions of law arising out of the bench trial.

A. DOES USE OF THE MOTORS MANUAL AS A BASIS FOR ESTABLISHING RETAIL LABOR RATES VIOLATE SECTION 1174(1)

The Motors Manual is a commercially published trade manual that repair shops use to price labor operations. Section 1174(1) provides that

> [i]t shall be unlawful for any . . . motor vehicle dealer to engage in any action which is arbitrary, in bad faith or unconscionable and which causes damage to any of said parties [including a manufacturer] or to the public.

10 M.R.S.A. § 1174(1). Ford asserts that using the Motors Manual to calculate labor rates violates section 1174(1) and that Darling's therefore cannot claim labor reimbursement on that basis. Def. Ford Motor Co.'s Offer of Proof Concerning Retail Labor Rate Reimbursement Claims, Sept. 30, 1997, ¶¶ 34 & 36. According to Ford, the Motors Manual times "are merely an arbitrary markup of the reasonable and generous Ford manual's times," id. ¶ 34, and "Darling's use of Motors Manual times . . . causes damages to Ford, to Darling's non-warranty repair customers and to the public." Id. ¶ 36. At the root of Ford's position is the contention that Darling's, by using the Motors Manual, charges too much and that the practice is arbitrary, unconscionable, or in bad faith.

There is no Maine case law interpreting section 1174(1). Schott Motorcycle Supply, Inc. v. American Honda Motor Co., 976 F.2d 58, 63 (1st Cir. 1992) (noting the same). In the absence of controlling precedent, the First Circuit in Schott Motorcycle has directed courts

to apply the "generally accepted meanings" of the terms arbitrary, unconscionable and bad faith. Id. According to Schott Motorcycle, "'arbitrary' has been defined as 'selected at random and without reason,' and 'unconscionable' as 'shockingly unfair or unjust.'" Id. Good faith is defined as "'honesty in fact and the observation of reasonable commercial standards of fair dealing in the trade' as defined and interpreted in § 2-103(1)(b) of the U.C.C." Id. Conversely, bad faith is found "when one of these two elements is missing." Id.

Overly generous labor times in a trade manual used for setting labor charges simply do not meet these standards. If Darling's is charging nonwarranty customers too much by using the Motors Manual, market forces can make the appropriate correction.

B. ARE ANY CLAIMS BARRED BY CLAIM PRECLUSION?

After the passage of the 1991 amendment, Darling's began filing small claims actions against Ford in March 1992 to recover additional warranty reimbursement under section 1176. It filed the last of its small claims actions against Ford on April 28, 1995. Because reimbursement between Ford and its dealers occurs through a running account showing a net amount due, Ford claims that all transactions before April 28, 1995 are now barred by claim preclusion. It filed a partial summary judgment motion accordingly.

Treating the running account as a single, cumulative transaction, Ford relied on the "merger and bar" branch of claim preclusion, which prevents a party "from splitting its related claims among several suits." Lundborg v. Phoenix Leasing, Inc., 91 F.3d 265, 270

(1st Cir. 1996). The rationale of the rule is to "respond[] to the parties' interest in repose and the courts' desire to avoid needless litigation." Id. But "a recognized exception to the general rule prohibiting claim splitting is that if the parties agree, or a defendant implicitly assents, to a plaintiff splitting [its] claim, then a judgment in an earlier action which normally would bar the subsequent action will not." Calderon Rosado v. General Electric Circuit Breakers, Inc., 805 F.2d 1085, 1087 (1st Cir. 1986).

Here, Ford made no showing that it ever objected to individualized treatment of Darling's multitude of claims in the state district court small claims division. Indeed, a decision by Judge Russell in 1993 treated each warranty request as a separate claim not subject to consolidation for purposes of the small claims procedure and the jurisdictional amount. See Darling's Honda/Nissan v. Nissan Motor Corp., No. 92-SC-187 et al., slip op. at 2 (Me. Dist. Ct. Oct. 20, 1992). Given Ford's conduct in the state district court and the state district judge's treatment of such claims, I concluded in my Order of August 21, 1997, that there was no general claim preclusion, but that the state district court's decision would govern any claims that were actually ruled on with prejudice. Accordingly, I denied Ford summary judgment on this issue, treating the claim preclusion issue as a purely legal matter.

At the October hearing (past the date of the final pretrial conference), Ford's lawyer made clear that Ford had no other evidence on the issue. Hr'g Tr. at 32-33 (Oct. 29, 1997) ("[A]s I sit here today, I can't tell you whether there's any evidence one way or the other on whether Ford objected to or said it didn't object to a barrage of small claims cases, we don't know what it is ."). Given the late date, I tentatively ruled then that absent an extraordinary

showing, any such evidence would be barred as untimely. At trial, Ford made no attempt to present evidence on this matter, and I therefore consider it resolved finally against Ford. Without evidence other than what was presented on the summary judgment motion, Ford loses not only summary judgment, but also the merits of its claim preclusion defense.

C. DID DARLING'S PROPERLY PRESENT ITS CLAIMS TO FORD OR DID IT FAIL TO FILE CLAIMS OR USE FORD'S PROCEDURES AND, IF SO, WAS DARLING'S LEGALLY REQUIRED TO COMPLY WITH FORD'S PROCEDURES?

Ford claims that section 1176 "makes the filing of a particularized claim with the manufacturer a precondition to recovery. . . .", Def.'s Trial Brief at 11 (Nov. 3, 1997), and that Darling's is required to comply with Ford's "Warranty Parts Retail Reimbursement Procedure," Exhibit 27, which Ford apparently views as coextensive with the so-called "particularized claim" requirement. Ford then concludes that Darling's failure to comply with Ford's procedures bars its claims for reimbursement.

Darling's maintains that its claims are adequate under the statute and Acadia Motors. Darling's concedes that it eventually stopped trying to comply with Ford's specific procedures, but only after Ford repeatedly and consistently denied its claims. Darling's argues that its eventual refusal to follow Ford's reimbursement procedure should be excused on the grounds that Ford's procedure is unduly burdensome, contrary to the law, and an exercise in futility. Pl.'s Trial Brief at 12-13 (Nov. 3, 1997).

(1) Is Darling's Excused for its Failure to Comply with Ford's Retail Reimbursement Procedure(s)?

The 1991 amendments to section 1176 took effect on October 9, 1991. Shortly thereafter, Darling's wrote a letter to Ford observing that "current warranty entry procedures [in the DWE computer system] do not allow [dealers] to enter the retail price" contemplated by the new statute, Ex. 3, and requested a procedure for submitting claims for warranty reimbursement. The ensuing months and years are marked by correspondence reflecting the sharp disagreement between Darling's and Ford over the requirements of the amended statute.

Labor. Ford concedes that it never provided new warranty labor reimbursement procedures to meet the statute as I have interpreted it. Instead, Ford made clear that it would honor no labor reimbursement requests for other than hourly rates and Ford's approved time for a given repair. I conclude, therefore, that Darling's labor claims (based on flat rates) are not foreclosed by any argument that they were not adequately "particularized" by Ford's standards. On the other hand, Darling's made no claim at all for labor under the statute until March 6, 1993, and therefore certainly cannot recover anything for labor before that date.

Parts. With regard to parts reimbursement procedures, the evidence shows that between January of 1992 and February of 1994, Ford responded as follows:

1. January 14, 1992: A letter, responding to Darling's' letters of October 1991 and January 1992, outlined a procedure that contemplated an "average retail markup" and informed Darling's of Ford's "intention to offset parts mark-up above 30%." Ex. 5;

2. February 12, 1993: A letter to all Maine dealers announced a new flat reimbursement rate of 63% above cost for all Maine dealers, with an offsetting $160 warranty surcharge per vehicle. The letter asserted the need "to maintain parity among all dealers under Maine law." This letter also stated that Ford "regret[ted] this action . . . must be taken because of a single dealer [Darling's] action." Ex. 13;

3. November 19, 1993: A letter from Phil Meilak of Ford to John Darling attached a copy of "an alternative" procedure to the February 1993 procedure and informed Darling that the two procedures "are mutually exclusive." Ex. 23. The "alternative" procedure is similar to Ford's current procedure, described immediately below;

4. February 22, 1994: A letter from Ford to all Maine dealers, following the district court's decision in Acadia Motor, canceled the February 1993 procedure and replaced it with a two-step procedure under which dealers were to submit first via Ford's computerized reimbursement system to receive the national markup and then follow a detailed procedure to recover the difference they claimed between the national rate and their asserted retail rate for nonwarranty work. Ex. 27.

The February 22, 1994 procedure is Ford's current procedure. It is this procedure that Darling's contends is unduly burdensome and contrary to law.

I conclude that Darling's' failure to comply with Ford's changing procedures for parts, including the current procedure, does not bar its claims. Failure to comply with Ford's procedures after 1994 is not fatal because by then, Ford required a part-for-part match which, I have ruled, is not mandatory. (Darling's' failure to comply with the "alternative" procedure offered to Darling's alone in 1993, Ex. 23, is excused on the same ground.) The 1993 procedure applying a uniform markup rate to all Maine dealers was completely contrary to the statute, and Darling's therefore cannot be required to meet Ford's procedural niceties

for it. It is tempting to say that Darling's' claims for 1991 and 1992 are barred because it failed then to comply with what it now admits was an administratively easy and reasonable individual dealer averaging procedure. But the statute does not provide for averaging, and Darling's is therefore not precluded by its failure to average and document.

One other procedural requirement imposed by Ford, however, may give Darling's some difficulties. Since January 1, 1993, Ford's Warranty and Policy Manual has imposed a 180-day time limit for making warranty claims. Ex. 197 at 6.0-16. Darling's argues that the statute makes this 180-day limit impermissible; or, if not, that the time limit is tolled once *any* warranty claim is submitted. Since all warranty claims are submitted electronically for the national reimbursement amount, amended claims for reimbursement thereafter—Darling's argues—are not subject to the 180-day limit. I conclude that Darling's is wrong on both arguments. First, nothing in section 1176 prevents a manufacturer from imposing a reasonable time limit for claim submission, and 180 days is hardly stingy. Second, it makes no sense of the limit to say that once an initial claim is filed, a dealer has unlimited opportunities to resubmit the claim until it obtains what it seeks. The language of the contract is clear. It states: "Effective January 1, 1993, the claim submission time limit will be 180 days. Claims over 180 days from date of repair will not be accepted." Id. I thus conclude that even when Darling's has made a timely automated uniform warranty reimbursement claim, the 180-day limit applies to any later claim for the extra reimbursement that Maine provides. If any of Darling's' extra reimbursement claims are more than 180 days from the date the work was performed, they are barred.

(2) The Nature of the "Particularized Claim" Requirement

Although I conclude that Darling's did not have to comply with Ford's specific procedures given their nature, that does not end the matter. Section 1176's reference to a time-limited claims payment procedure with written justification for any rejection obviously contemplates a claim of *some* particularization, sufficient that a manufacturer can approve or disapprove it. In the Acadia Motors case, a case to which Darling's was a party, a Maine dealer had notified Ford of the 1991 amendment to section 1176 via a letter that concluded with a demand that Ford "credit our account for all warranty parts from the 7th on." Acadia Motors, 844 F. Supp. at 828. Apparently, it provided no other specifics. As a result, Judge Brody was

> satisfied that Plaintiffs did not make an *adequately particularized claim* to Ford prior to bringing this action. *Ford is entitled to some notice informing it of the pertinent facts regarding the claim.* . . . The Court does not find persuasive Plaintiffs' response that "[i]t is not possible to make a claim for a retail amount under [Ford's computerized] system." *Plaintiffs could have provided Ford a particularized claim in some other form.*

Id. (emphases added). Thus Judge Brody held that section 1176 requires "some notice . . . of the pertinent facts regarding the claim. . . ." But his conclusion that a request whose sole detail is "all warranty parts from the 7th on" is not adequately particularized (and the First Circuit's statement that the district court "ruled that the Dealers did not make an adequately particularized claim to Ford prior to bringing suit," Acadia Motors II, 44 F.3d at 1053), did not charge dealers with a duty to comply with Ford's own particular reimbursement

procedures. Darling's, a party to the Acadia Motors case, therefore is not collaterally estopped. Acadia Motors sheds no further light on the substance of the particularized claim requirement; it tells us only that a claim for reimbursement simply for "all warranty parts" is insufficient.

Since 1993, Darling's has used a formal demand letter with attached computerized printouts apprising Ford of the Maine statute and specifying (1) the DWE claim number; (2) the retail amount claimed; (3) the amount Darling's received under DWE; (4) whether it was a claim for parts or labor; and (5) the difference between the DWE amount received and the retail prices. See, e.g., Exs. 14, 17, 19. I find that this level of detail fully meets the "particularized claim" requirement of Acadia and the statute.

D. ARE CERTAIN CLAIMS BARRED BY THE STATUTE OF LIMITATIONS?

Darling's commenced this suit in state court (Ford later removed it to federal court) by serving Ford with a copy of its Complaint on November 29, 1995.[8] Maine law provides that "[a]ctions arising out of any provision of [Chapter 204, of which § 1176 is a part] shall be commenced within 4 years next after the cause of action accrues." 10 M.R.S.A. § 1183. Thus claims for parts or labor supplied before November 29, 1991, are barred by the statute of limitations.

E. ACCORD AND SATISFACTION

[8] Under Maine law, "[a]n action is commenced when the summons and complaint are served or when the complaint is filed with the court, whichever occurs first." 14 M.R.S.A. § 553.

Although it was not one of the issues listed in the Trial Management Order, Ford argued at trial that Darling's' acceptance of credits under the Ford DWE system constitutes accord and satisfaction at the national rates that bars Darling's from seeking additional reimbursement under section 1176. I am unpersuaded.

Under Maine law, accord and satisfaction is an affirmative defense that the asserting party must prove by a preponderance of the evidence. E.S. Herrick Co. v. Maine Wild Blueberry Co., 670 A.2d 944, 946 (Me. 1996). Accord and satisfaction can "exist as a matter of law if 'an amount is tendered on a clear and unambiguous written condition that it be accepted in full settlement of all claims pending between the parties' and the claimant accepts payment of the amount tendered.'" Id. The Law Court has stated, however, that "[w]hen the condition on which [a] tender is made ambiguous or there is doubt as to what the parties intended or should have reasonably understood . . . there is no accord and satisfaction as a matter of law." Id. (citing inter alia, Farina v. Sheridan Corp., 153 A.2d 607, 614 (1959) (although check was marked "in full," exchange of correspondence between the parties raised an issue as to their mutual understanding)).

Ford required Darling's to perform warranty work under its Sales and Service Agreement. After enactment of the 1991 statutory amendment, Darling's began seeking a procedure by which to obtain the difference between Ford's national reimbursement rate for parts and Darling's' retail rates. Specifically, within days after the new requirement for warranty parts reimbursement at retail rates took effect, Darling's notified Ford of its desire

and intention to seek retail reimbursement. Ex. 3. This letter, the long stream of correspondence that followed it, and other events, including the filing of this and other lawsuits by Darling's, certainly demonstrate that Darling's did not accept the DWE payments as payment in full of its warranty reimbursement claims.

Moreover, the evidence makes clear that Darling's' continued use of the DWE system was not a *voluntary* accord and satisfaction. Ford's supplemental reimbursement procedures were generally two step processes under which dealers first were *required* to use the DWE system to obtain the national reimbursement rate and then to submit supplemental claims for the difference between the national rate and retail.[9] Ford's first supplemental reimbursement procedure, for example, stated that "[d]ealers who elect to receive a markup different from the national program . . . [should] continue submitting warranty claims on DWE at the national parts mark-up. . . ." Ex. 5. Ford's third procedure, mailed exclusively to Darling's as an "alternative" to the 63%/$160 plan,[10] also implicitly contemplated initial submission of claims through DWE, in that it clearly described a procedure for obtaining the "difference . . . between the amount reimbursed by Ford at its national markup rate and the dealer's requested retail rate." Ex. 23. Finally, Ford's fourth and current procedure requires Maine dealers to "continue to submit warranty claims through DWE for payment at Ford's national

[9] Only the second procedure, the 63%/$160 plan, was a one step procedure, because it was not optional and applied to all Maine dealers. It required that warranty claims "continue to be submitted as normal through the Direct Warranty Entry (DWE) System or by mail," Ex. 15, and then automatically reimbursed Maine dealers at a rate that was higher than the national rate.

[10] Darling's was offered no way to request reimbursement at its actual retail rates until the third procedure.

parts reimbursement rate" prior to seeking supplemental reimbursement. Ex. 27. Thus, all along, Ford has required Darling's to use DWE as a precondition to seeking supplemental reimbursement. As a result, Darling's acceptance of DWE cannot be viewed as accord and satisfaction that prevents the supplemental claim.

F. WAIVER OF OBJECTIONS

Although it was not one of the listed issues for trial, the parties presented evidence on the issue whether Ford had timely responded under the statute to Darling's' claims—in other words, whether it met the 30-day statutory deadline. I find from the evidence presented that Ford did meet the deadline for objecting to Darling's' claims in each instance. Therefore, Ford is not prevented under the statute from challenging the amount of Darling's' customary rates.

G. DID DARLING'S HAVE A "RETAIL RATE CUSTOMARILY CHARGED"?[11]

Since the parties cannot agree, it will ultimately be necessary to determine the customarily charged retail price for every transaction, whether labor or parts. This extraordinarily time consuming undertaking is of the nature of an accounting procedure once the rules are laid out. I have told the parties from the outset that I expect to assign this task to a special master under Rule 53. It is necessary, therefore, for me to make findings on what Darling's' customarily charged retail prices were so that the special master can apply them to particular transactions.

(1) Darling's' Claims

Darling's claims that it has had regular methods for pricing parts and labor throughout the relevant time period. Through much of the litigation process, Darling's maintained that for parts, its retail pricing formula was cost plus 85%. For labor, Darling's claimed that its formula was the Motors Manual time multiplied by Darling's' hourly rate. By the time of trial, however, it was clear even to Darling's that Darling's' pricing methods were far more complicated than it had originally represented. I set forth here the pricing methods Darling's presented at trial.

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[11] This was the question posed as a result of the trial management conference and it resulted from the developing arguments in the case at that time. Specifically, Ford had argued that a precisely matching sale within six months had to be documented. In contrast, Darling's maintained that if it had a uniform pricing system that determined how various parts would be priced, it did not have to prove an actual sale of the part in question within a relevant time period. After hearing further argument as well as the testimony, I have now concluded that the statute does not require Darling's to prove a uniform system. Instead, the statute contemplates that Ford and Darling's will determine a "retail rate customarily charged" for each part that Ford purchases under warranty, whether or not it has previously been sold in a nonwarranty transaction by Darling's and whether or not Darling's' pricing system is uniform

Parts. According to Darling's, from October 1991 through November 1994, its parts markup for *repair* parts (which, according to Darling's, are more commonly seen in warranty work than "maintenance" or "Motorcraft" parts) was cost plus 85%. Trial Tr. at 127 (Nov. 17-18, 1997). Darling's claims that in November 1994, it switched from its one-line matrix to a new, "multistage" matrix that continues to dictate Darling's' pricing practices to the present. Id. at 129 & Ex. 88.

From 1991 to 1993, *maintenance* or "Motorcraft" parts were priced at the higher of the Motorcraft list price or cost plus 85%. Trial Tr. at 128 (Nov. 17-20, 1997). Different markup rates, however, applied to parts "that didn't fit either [the repair or maintenance] mold[]," such as oil filters, id. at 128, or parts that were "cost sensitive" for competitive reasons (for example, batteries and engines were priced at cost plus 25%; transmissions and accessories were priced at cost plus 33%). Id. at 133-34, 138, 153. Darling's refers to such unwritten pricing practices that diverge from the standard markups as "customary" pricing. Id. at 128-29. From some point in 1993 through November 1994, Darling's continued to price maintenance parts at the higher of Motorcraft list or the one-line matrix. During that time, however, Darling's also began using pricing "menus," Ex. 82, which were introduced in 1993, and which formalized, in writing, some but not all of its customary prices for maintenance parts. Id. at 137. From November 1994 to the present, Darling's claims that it priced maintenance parts according to the higher of the matrix or Motorcraft list, and also the menus. Id. at 139.

Labor. As with its parts pricing methods, Darling's now claims a multi-faceted pricing system for labor. Trial Tr. at 141. Darling's claims that the "one of the prime aspects" of its pricing mechanism is the Motors Manual. Id. Prices on certain "popular repairs," such as alignments and oil changes, appear on "maintenance menus" that override the Motors Manual prices. Id. at 142. Darling's uses "customary" (unwritten) pricing for certain other labor operations. Trial Tr. at 141. Darling's claims that "[o]ccasionally, [Darling's] can go to the Ford [Standard Labor Time] Manual, if [a time for a labor operation is] not available in the Motor Manual." Id. at 142. In these instances, Darling's uses the Ford time as a guideline, but then marks up the time according to a matrix listed on a sheet that it calls its retail pricing guide. Id. & Ex. 223-25.

In addition to using manuals and menus to price labor operations, Darling's also claims to use several other pricing methods. If it is either impossible to determine the actual time it will take to do a job, or if a customer asks for an estimate or quote (in which case the Maine statute imposes a duty on Darling's to comply with the request), Darling's will provide an estimate or quote to a customer . Id. at 146. In these cases, the quote is the price. Id. If a job is of a nature that it "would be impossible or very difficult . . . to do under a manual" (e.g., the source of an odor in a car), id., Darling's will charge a customer the actual time that it takes a technician to complete the job. Id. at 147.

Darling's claims that it also developed a "work list," Ex. 83, approximately eleven years ago, id. at 325, to price jobs regularly done by Darling's but most of which were not in the manuals, id. at 147-48, and most of which involved "accessory type items or items that

are aftermarket type options for a vehicle." Id. at 331. According to the testimony, the work lists have not been updated for a number of years, and certain operations that appear on them also appear on the menus, in which case the menu overrides the worklist. Id. at 148.

To demonstrate that it did indeed have consistent pricing practices, Darling's conducted a series of pricing studies, in which it analyzed thousands of retail transactions.

(2) Ford's Claims

Ford counters that "neither Darling's retail part pricing 'system' nor its retail labor pricing 'system' has been consistently implemented according to the formulas repeatedly represented to the Court." Def.'s Trial Br. at 8 (Nov. 3, 1997). At trial Ford set out to demonstrate that Darling's "does not have a coherent consistent pricing method either for parts or for labor." Trial Tr. at 19 (Nov. 17-20, 1997).

With regard to parts, Ford's position is that Darling's has no single method for pricing parts, but rather uses several different methods at different times. In addition, Ford claims that a high percentage of the time Darling's does not follow its stated methods consistently. Similarly, with regard to labor, Ford claims that Darling's uses several different and sometimes inconsistent methods for pricing labor, and that contrary to Darling's' original contention, Darling's uses the Motors Manual to determine labor prices relatively rarely.

Ford conducted its own analyses of Darling's' pricing studies in an effort to reveal the lack of consistency in Darling's' pricing practices and to support Ford's position that Darling's' "failure to employ uniform and verifiable pricing systems precludes this Court

from determining Darling's' 'customary' retail prices on its parts or its labor without a part-by-part and claim by claim analysis." Def.'s Trial Br. at 8 (Nov. 3, 1997).

(3) Findings

There is a good deal of merit to Ford's criticisms. Indeed, it would be fair to say that Darling's' initial claims about its pricing methods—both as submitted to Ford and as represented to the court—were grossly oversimplified. The evidence shows that the company's president did not himself really know what the pricing structure was and discovered accurate information only as a result of responding during this lawsuit to Ford's criticisms and preparing for trial. It is hard to view Darling's' pricing practices as a coherent "system." They have grown up randomly and haphazardly depending upon custom, tradition, competitive needs and comparable pressures. Although Darling's has a computer system with prices entered in it, these prices are often overridden at the time of billing.

Nevertheless, the statute does not require a "system." It requires only that Ford reimburse its dealers at the "retail rate customarily charged for the same part." Given the statutory purpose of preventing manufacturers from taking advantage of their economic leverage to obtain low prices (and thereby shift the pressure for higher prices to Maine nonwarranty customers), it makes no sense to conclude that Ford can impose its own price whenever a dealer cannot come up with a matching nonwarranty sale. The only sensible

interpretation of the statute is that a "customary" price must be determined for each part and labor procedure.[12]

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[12] I have some concern for the long term workability of this statute. It simply will not work if all dealers must bring all claims to court for final disposition. The statute merely provides that a dealer may make a claim upon a manufacturer, the manufacturer is given 30 days to approve or disapprove the claim and, if it disapproves, must give "specific reasons for its disapproval." No hint is given as to what steps a manufacturer may take to avoid fraudulent or inaccurate claims and the parties stipulated at trial that manufacturers are entitled to take such steps, given the huge volume of claims, and the frequent inaccuracies in dealers' reimbursement claims. When the statute dealt with labor rates, the Legislature satisfied its concern over *bona fides* by adding the posting requirement. See Final Report of the Study of H.P. 1459 at 4. But when parts were added in 1991, no mention was made of the *bona fides* issue. In a conventional warranty claims procedure (*i.e.*, without the Maine statute, but simply using Ford's uniform rates), Ford performs a later audit from time to time to review previous claims. If there are inaccuracies or errors, they are then charged back against the dealer. During a heated exchange of letters, however, Darling's argued in 1992 that no such later audit was available to Ford under the Maine statute because the statute requires approval or disapproval within 30 days and payment of approved claims within 30 days thereafter. Darling's argued, therefore, that Ford had no basis later to audit and charge back. On its face, the statute would support such a time-limited reading but, as Darling's' lawyer recognized at closing argument, that would make it administratively unworkable; there is no way a manufacturer can review every dealer's warranty claims for accuracy within 30 days without placing intolerable burdens on both the manufacturer and the dealer. This is not a minor problem. There are thousands of parts and thousands upon thousands of warranty claims. If a nonuniform rate is to be used for reimbursement, there must be some reasonably inexpensive way for a dealer to make and support a claim and some reasonably inexpensive way for a manufacturer to ensure that the amount of the nonuniform claim is legitimate. Otherwise, we have the name-calling that has gone on in this controversy, with Darling's arguing that Ford's procedures are designed to discourage outright all such claims and Ford arguing that Darling's is creating retail prices out of whole cloth. The problem is further complicated by the fact that dealers like Darling's do not always have computer pricing systems for every transaction, or even written policies that always govern. Instead, by custom and competitive needs, there may be oral traditions as to what the price is for a particular part or procedure, or a set of overlapping rules with a complicated procedure for determining what set of rules applies in a given transaction.

How then can the rate be determined under the statute in a way that is fair to both dealer and manufacturer? Clearly a dealer that can prove actual nonwarranty retail sales of the identical part should meet any test, although even there a manufacturer may want the opportunity to demonstrate that the dealer had other sales of the same part that qualify better for the definition of "customary." As I have already held, however, dealers cannot be limited to this method of proving customary prices under the statute. A second method would be for a dealer to develop written pricing policies that govern without exception and whose enforcement is subject to testing by later audit. To avoid having to list a price for every single part, dealers might create categories of parts for which they used single markups (e.g., accessories: 33%; repair parts: 85%, etc.) This might simplify applying the "part by part" language of Acadia--because as long as something was a "repair part" it would be a matchup to another "repair part." Given the apparent fluidity of the market for car parts, however, this sort of categorization might prove too riddled with exceptions to be meaningful. A better method would be a computerized pricing calculation that is not subject to override. Oral pricing policies or unwritten traditions are much more difficult for a dealer to prove in a claim or for a manufacturer to check for authenticity. (It makes no sense to have to conduct the kind of expensive and time-consuming later pricing studies conducted here to find out what the pricing system really was or to test conformity to the unwritten traditions or overlapping policies.) A third method—the dealer's average percentage markup for 300 consecutive repair transactions, proposed by Ford in 1992 and endorsed by Darling's now—is attractive as an inexpensive and easy-to-administer compromise, but hard to square with the statutory language that the relevant price is that of the "same" part. I invite the parties to request the Legislature to consider these practical difficulties.

I therefore proceed to lay out in tabular format the general parameters of Darling's' customary prices as I can determine them from the evidence presented at trial. The special master, however, will have to determine as to each particular part or labor procedure whether it fits within those general parameters or is subject to some kind of exception. I recognize that the special master may well find for many parts or labor procedures that the customary retail price is not the amount that Darling's originally demanded of Ford. That does not prevent Darling's from recovering; however, it does set a ceiling. In other words, Darling's cannot now obtain more than it originally demanded, but Ford may well be able to show that Darling's' customary price was less.

DARLING'S PRICING METHODS

REPAIR PARTS

Dates	Pricing Method
11-29-91 thru 11-94	1. Competitive Prices for items like batteries; otherwise, 2. Cost plus 85%
11-94 thru present	1. Competitive Prices for items like batteries; otherwise, 2. Multilevel Matrix

MAINTENANCE PARTS

Dates	Pricing Method
11-29-91 thru 10-93	1. Competitive Prices for items like oil/filters; otherwise, 2. Cost plus 85% OR Motorcraft list price (whichever is higher)
10-93 thru 11-94	1. Menu; otherwise, 2. Competitive Prices for items like oil/filters; otherwise, 3. Cost plus 85% OR Motorcraft list price (whichever is higher)
11-94 thru present	1. Menu; otherwise, 2. Matrix OR Motorcraft list (whichever is higher)

LABOR*

Menu (overrides worklist, manuals)
Worklist (overrides manuals, but is subordinate to menu)
Motors Manual x hourly rate
Ford Manual x hourly rate x RPG markup
Actual Time
Estimate/Quote (upon customer request)

*Darling's also adds a "materials charge" of 8% (6% until the fall of 1993) to cover incidental expenses (maximum per customer is $40). Trial Tr. at 326.

IV. CERTIFICATION TO THE LAW COURT

It is obvious that a tremendous amount of time, effort and attorney fees will be consumed in determining what the customary retail price was for each warranty transaction over the past several years. Under the statute, Darling's will recover its attorney fees and costs for each claim on which it prevails, and the attorney fees are specifically *not* limited by the amount of the claim. 10 M.R.S.A. § 1176. Before the parties engage on this tremendously expensive undertaking, it makes sense to obtain a definitive ruling on the law so that the exercise and expense are not futile. All the important issues here involve interpretation of a Maine statute. Obviously the Law Court is the appropriate court to define finally what the statute means and requires. I propose, therefore, to certify those statutory questions to the Law Court under Maine Rule of Civil Procedure 76B. Applying the criteria

of Rule 76B, I find that there are no clear controlling precedents because the Law Court has never yet spoken to the interpretation of this statute. The questions of law may be determinative of the cause because, if Ford's arguments are accepted, Darling's has previously been paid all that it is due and judgment should enter for Ford.

I propose to certify the following issues of state law:

1. What sort of particularized claim is required;
2. The meaning of "labor rate";
3. Legality of using the Motors Manual.
4. The posting requirement for labor claims;
5. How to prove retail rates customarily charged for parts;

I propose not to certify the following questions:

1. The constitutionality of the statute (Ford is precluded from litigating this as a matter of collateral estoppel under federal law);
2. Accord and satisfaction (the Maine Law Court precedents are clear here);
3. Coverage of sublet repairs (there is no uncertainty on the law here);
4. Coverage of recall and customer notification programs (there is no uncertainty on the law here);
5. The statute of limitations issues (there is no uncertainty on these issues);
6. Claim preclusion by virtue of the running account (there is no uncertainty on this issue);
7. Ford's potential waiver of objection (this is a matter of federal trial management);

8. Legality of the 180-day claim limit (there is no substantive legal question here).

I therefore attach as Exhibit A a proposed Certificate under Maine Rule of Civil Procedure 76B. I invite both parties' lawyers to comment on the proposed certificate no later than March 4, 1998. I will then determine if a conference is necessary.

IV. JUDGMENTS

Declaratory judgment is entered on behalf of Darling's Bangor Ford on Count I of the Complaint. Section 1176 does not require a dealer to provide proof of a retail sale for each part for which it requests retail reimbursement.

Declaratory judgment is entered on behalf of Ford Motor Company on Count I of the Counterclaim. Sublet repairs are not within the coverage of section 1176 and the statute thus does not require Ford to reimburse dealers at a rate in excess of the dealer's own cost.

Finally, I question the continuing viability of Count II of Ford Motor Company's Counterclaim, requesting entry of a permanent injunction against Darling's enjoining Darling's from continuing to file small claims actions against Ford pending final resolution of the issues in this case. It is my understanding that this issue has been resolved by agreement. The parties shall notify me by February 25, 1998, concerning the status of this Count.

In addition to Count II of the Counterclaim, Counts II, IV, III, and IV[2] of the Complaint remain outstanding.[13]

SO ORDERED.

DATED THIS 19TH DAY OF FEBRUARY, 1998.

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D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

[13] The counts of the Complaint were out-of-order and duplicative. By way of clarification, the outstanding counts are: Count II: damages for parts; Count IV: damages for labor; Count III: attorney's fees and costs; and Count IV[2]: injunctive relief.