To remedy the problem, NCLC suggested that the Buyers Guide be revised to include an "Implied Warranties Only" section on the "As-Is" version of the Buyers Guide.66 If this revision were adopted, the Buyers Guide would give dealers the option of checking one of three boxes: "As-Is No Warranty," "Implied Warranties Only," and "Warranty." The comments contended that most consumers do not know that implied warranties are available as a form of legal redress.⁶⁷ If all versions of the Buyers Guide contained an "Implied Warranties Only" provision, or at least alerted consumers that implied rights exist, consumers would be on notice that they may be forsaking possible legal redress to which they would otherwise be entitled but for the dealer's decision to sell the vehicle "As-Is." Consumers then might attempt to negotiate a better warranty agreement with the dealer than an "As-Is" deal. Also, some dealers might even choose to offer implied warranties rather than use "As-Is" sales if they were given an easy choice and did not have to use a special form or make a substitution on the form. If their only choice is "As-Is" or an express warranty, NCLC contends, dealers nearly always choose to sell vehicles "As-Is." ⁶⁸

Washington's Attorney General asserted that the Rule should only allow use of the "Implied Warranties Only" version of the Buyers Guide, because, given the choice to sell with a warranty or "As-Is," dealers opt simply to check off the "As-Is" provision. The Washington State Attorney General stated that the "As-Is" provision may provide an unintended shield for some unscrupulous dealerships that fail to use required procedures for disclaiming implied warranties under Washington contract law. The comment stated that Washington consumers are not generally aware that, under Washington law, their waiver of the implied warranty of merchantability must be knowing and voluntary. Warranty terms or the absence of implied warranties must be the subject of explicit negotiations between the parties (written disclaimers are not enough). The Rule does not

disclose preconditions to a valid disclaimer of implied warranties peculiar to Washington State Law.⁶⁹

ii. *Discussion.* The Buyers Guide focuses on written warranties because during the rulemaking the Commission found that oral promises made during used car sales were frequently contradicted by the written documents, and that the parol evidence rule operated to exclude the admissibility of oral promises contradicted by a written contract.⁷⁰ In the SBP, the Commission recognized that "As-Is" purchases could operate to exclude other contractual rights. The Commission stated that:

consumers purchasing "as-is" but relying on contradictory oral promises are stripped of the protection afforded by either express or implied warranties and, at the same time, have no legal recourse against the dealer because prior or contemporaneous oral statements that contradict final written contract terms are generally not legally binding.⁷¹

To address this problem, the Commission sought to put consumers on notice that they should be wary of oral promises. Immediately under the words "Buyers Guide," on both forms of the Buyers Guide, is the following language: "IMPORTANT: SPOKEN PROMISES ARE DIFFICULT TO ENFORCE. ASK THE DEALER TO PUT ALL PROMISES IN WRITING. KEEP THIS FORM." In addition, the "As-Is" box contains the following statement: "YOU WILL PAY ALL COSTS FOR ANY REPAIRS. The dealer assumes no responsibility for any repairs regardless of any oral statements about the vehicle." The warnings on the Buyers Guide and its admonition to put all promises in writing help consumers by giving them information they can use to ensure they have enforceable rights. Thus, the changes suggested by NCLC (e.g., to revise the "As-Is No Warranty" title to "As-Is No Written Warranty") are not necessary. Such changes could lead to more uncertainty and disputes about warranty coverage. The Commission continues to advise that consumers get any promises in writing, rather than trying to prove later that a dealer orally promised to make repairs.

NCLC also suggested that the Buyers Guide be revised to reflect that options other than repair are available. However, repair is the most common remedy offered by dealers. Dealers, of course, are free to offer other options on the Buyers Guide, if they choose. Further, the Buyers Guide does not take the place of the warranty documents that dealers must provide pursuant to rule 701. The Buyers Guide refers to these documents in the "Warranty" box on the Buyers Guide: "ASK THE DEALER FOR A COPY OF THE WARRANTY DOCUMENT FOR A FULL EXPLANATION OF WARRANTY COVERAGE, EXCLUSIONS, AND THE DEALER'S REPAIR OBLIGATIONS."

NCLC also suggested reformatting the Buyers Guide to include "As-Is," "Implied Warranties Only," and "Warranty" sections on the same Buyers Guide. The purpose would be to increase consumer awareness of implied warranty rights and the likelihood that implied warranty rights could be negotiated. There is no evidence that suggests, however, that including "Implied Warranties Only" as a third option on the Buyers Guide would encourage consumers to negotiate for warranty coverage more than they presently do, as NCLC suggests. Nor is there any evidence that supports the assertion that dealers would choose this option over the "As-Is" option if it were displayed on the Buyers Guide.

Comments such as the Washington Attorney General's indicated a desire to alert consumers that implied warranties exist. Others suggested adding language that categorically states that implied warranties are unavailable in "Ås-Is' sales.72 The "Warranty" section of the Buyers Guide contains the following language: "UNDER STATE LAW, 'IMPLIED WARRANTIES' MAY GIVE YOU EVEN MORE RIGHTS." The existing language alerts consumers that the other option to an "As-Is" sale is one with a warranty, and that, along with an express warranty, the buyer may receive even more rights (implied warranties) under state law. Similarly, amending the "As-Is" portion of the Buyers Guide to state that implied warranties are never available in an "As-Is" transaction would likely create confusion in states such as Washington, where implied warranties must be knowingly waived.73 Further, such language would misstate the law when a service contract is sold with a vehicle.74

Although some consumers are not aware that implied warranties are available under state laws, many states permit "As-Is" sales and do not require disclosures or preconditions to such sales. The problem presented by the

⁶⁶NCLC also suggested amending the "As-Is" box on the Buyers Guide to include language that made clear that an "As-Is" sale precludes implied warranties. B–23 at 5.

⁶⁷ An implied warranty of fitness indicates that a car "is reasonably fit for and adapted to the purposes for which it was purchased, i.e., a vehicle that will carry a driver and passenger with reasonable safety, efficiency and comfort." *Berg* v. *Stromme*, 79 Wn.2d 184, 195, 484 P.2d 380 (1971). The *Berg* court uses the word fitness interchangeably with merchantability.

⁶⁸ B-23 at 8.

⁶⁹ B-17 at 2.

⁷⁰ See UCC 2–202.

⁷¹ SBP at 45698 (footnote omitted).

⁷² NCLC, B-27 at 5.

 $^{^{73}}$ See also discussion relating to Part IV, Question 5, infra.

⁷⁴ The Buyers Guide states: "IF YOU BUY A SERVICE CONTRACT WITHIN 90 DAYS OF THE TIME OF SALE, STATE LAW 'IMPLIED WARRANTIES' MAY GIVE YOU ADDITIONAL RIGHTS."