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Private Actions under the Magnuson-Moss Warranty Act

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In this Article, Professor Schroeder examines the changes that the Magnuson-Moss Warranty Act brings to the law of consumer product warranties. Particular emphasis is given to the relationship between the Act and the Uniform Commercial Code and to the ambiguities created by the language of the Act.

The Magnuson-Moss Warranty-Federal Trade Commission Improvement Act creates a federal private cause of action for breach of warranty obligations. The provision is deceptively simple:

> [A] consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief . . . .[1]

The federal action is parallel to and does not supplant state warranty remedies because the Act provides it does not restrict "any right or remedy of any consumer under State law or any other Federal law."[2] Since the consumer may recover all litigation expenses, including attorneys' fees, in a successful Magnuson-Moss action,[3] bringing a warranty action as a matter of federal rather than state law has advantages. There are, however, important differences between warranty recovery under Magnuson-Moss and under state law. This Article explores the new federal warranty law and compares it with the law of warranty which has developed under the Uniform Commercial Code (U.C.C.).[4]

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1. Magnuson-Moss Warranty Act § 110(d)(1), 15 U.S.C. § 2310(d)(1) (Supp. V 1975).
2. *Id.* § 111(b)(1), 15 U.S.C. § 2311(b)(1).
3. *Id.* § 110(d)(2), 15 U.S.C. § 2310(d)(2).
4. The similarities and differences between Magnuson-Moss and the Uniform Commercial Code have already been the subject of some discussion. Note, *Consumer Product Warran-*

Prior to discussion of the intricacies created by the new federal cause of action, a brief outline of the Magnuson-Moss Act is in order. The Act deals with deceptive warranty practices in the consumer products field. The draftsmen believed that warranties on consumer products often were too complex to be understood, too varied for consumers to make intelligent market comparisons, and too restrictive for meaningful warranty protection.[5] Their solution to these ills was a combination of disclosure requirements and minimum federal standards. No seller is required to give a warranty on a consumer product but, if a warranty is given, it must comply with the Act.

All written warranties on consumer products costing more than ten dollars must be prominently designated as either "full" warranties or "limited" warranties.[6] To be labeled "full," the warranty must satisfy minimum federal standards. The warrantor must remedy defective products without charge.[7] The implied warranties of merchantability or fitness for a particular purpose created under state law may not be disclaimed or limited.[8] Finally, any disclaimer of consequential damages must be conspicuous.[9]

These minimum standards do not apply to warranties labelled "limited." The theory of the Act is that consumers will associate full warranties with the minimum standards. By discriminating in buying between products which bear full warranties and those which carry only limited warranties, consumers will place competitive pressures upon manufacturers and sellers who offer the lesser warranty coverage. There is one major exception to this general scheme of allowing the seller of products covered by a limited warranty to be free from the federal standards. The Act's sponsors considered the practice of coupling express warranty terms with substantial disclaimers of liability to be inherently deceptive. The Act therefore pro-

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ties Under The Magnuson-Moss Warranty Act and the Uniform Commercial Code, 62 CORNELL L. REV. 738 (1977); Comment, *Effects of Federal Warranty Law on Washington U.C.C. Provisions*, 52 WASH. L. REV. 395 (1977).

5. S. REP. NO. 151, 93d Cong., 1st Sess. 6-8 (1973); H.R. REP. NO. 1107, 93d Cong., 2d Sess. 22-29, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702, 7705-11.

6. Magnuson-Moss Warranty Act § 103, 15 U.S.C. § 2303 (Supp. V 1975). Both full and limited warranties can be limited to a stated duration, *e.g.*, "full six month warranty" or "limited three year warranty."

7. *Id.* § 104(a)(1), (d), 15 U.S.C. § 2304(a)(1). The Act provides a specific definition of "remedy":

> The term "remedy" means whichever of the following actions the warrantor elects:
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> (A) repair,
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> (B) replacement, or
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> (C) refund:
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> except that the warrantor may not elect refund unless (i) the warrantor is unable to provide replacement and repair is not commercially practicable or cannot be timely made, or (ii) the consumer is willing to accept such refund.

Id. § 101(10), 15 U.S.C. § 2301(10).

8. *Id.* §§ 104(a)(2), 108, 15 U.S.C. §§ 2304(a)(2), 2308.

9. *Id.* § 104(a)(3), 15 U.S.C. § 2304(a)(3).

hibits even the warrantor who grants only a limited warranty from disclaiming liability for implied warranties.[10] Unlike the full warranty, however, a warrantor using a limited warranty may limit the duration of implied warranty liability to the same period as the period of liability on the written warranty.[11] A seller can escape implied warranty liability only by making no written warranty.

To improve the performance of warranty obligations, the Act contains an antitying provision.[12] This clause, which applies to full, limited, and implied warranties, forces warrantors to supply the labor and parts for warranty repair service free of charge if they wish to condition the warranty on use of labor or parts that are designated by brand name.[13]

The Act also provides that, to the extent required by rules of the Federal Trade Commission (FTC), warrantors must "fully and conspicuously disclose in simple and readily understood language the terms and conditions of [the] warranty."[14] To further facilitate informed consumer choice, the Act authorizes the FTC to establish rules requiring sellers to make warranty terms available for consumer inspection prior to sale.[15]

Both public and private enforcement powers are conferred by the Act. The Attorney General or the FTC may restrain persons from violating the Act or from making misleading warranties.[16] The FTC may treat a violation of the Act as an unfair or deceptive trade practice under section 5(a)(1) of the Federal Trade Commission Act[17] and exercise its remedial powers with respect to such violations.[18] It is the private enforcement rights conferred by Magnuson-Moss, however, that are perhaps the most far-reaching features of the legislation. The Act gives consumers a federal cause of action for breach of warranty, as well as the right to sue for "violations" of the Act.[19]

Because of the Act, a substantial body of warranty law is now federal. Unfortunately, poor drafting complicates the Act. It parallels the Uniform Commercial Code at some points but not others. Difficulties arise with respect to which transactions are subject to the Act, the nature of the causes

10. *Id.* § 108(a), 15 U.S.C. § 2308(a).

11. *Id.* § 108(b), 15 U.S.C. § 2308(b).

12. *Id.* § 102(c), (e), 15 U.S.C. § 2302(c), (e).

13. The FTC may waive this provision if the manufacturer demonstrates that the product will function properly only if the brand name parts or labor are used. *Id.* § 102(c), 15 U.S.C. § 2302(c).

14. *Id.* § 102(a), 15 U.S.C. § 2302(a). The Act states that the disclosure provisions apply to consumer products costing over $5. *Id.* § 102(d), 15 U.S.C. § 2302(d). The FTC has, however, raised the limit to $15 by regulation. 16 C.F.R. § 701.2 (1977).

15. Magnuson-Moss Warranty Act § 102(b)(1)(A), 15 U.S.C. § 2302(b)(1)(A) (Supp. V 1975). The FTC has promulgated such rules. 16 C.F.R. §§ 702.1-.3 (1977). These rules also apply to consumer products costing over $15. *Id.* § 702.3.

16. Magnuson-Moss Warranty Act § 110(c), 15 U.S.C. § 2310(c) (Supp. V 1975).

17. 15 U.S.C. § 45(a)(1) (Supp. V 1975).

18. Magnuson-Moss Warranty Act § 110(b), 15 U.S.C. § 2310(b) (Supp V 1975).

19. *Id.* § 110(d), 15 U.S.C. § 2310(d) (Supp. V 1975).

of action granted by the Act, and the relief made available to private litigants.

I
TRANSACTIONS SUBJECT TO THE ACT

The language in the Magnuson-Moss Act that creates the private cause of action seems straightforward. A "consumer" may sue a "supplier, warrantor, or service contractor" for breach of a written warranty, implied warranty, or service contract, and for a violation of the Act.[20] This apparent simplicity masks substantial questions of scope. There are three sets of problems: (1) What is a "consumer product" subject to the Act? (2) What representations constitute "written warranties" covered by the Act? (3) What persons qualify as "consumers" entitled to sue under the Act?

A. Consumer Product

The Magnuson-Moss Act gives the right to sue to "consumers." Under the Act a consumer is a buyer or other qualified transferee of a "consumer product."[21] A consumer product is broadly defined as "any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes . . . ."[22]

Although the term "consumer goods" is used in the U.C.C. the definition differs from that in Magnuson-Moss. Under the U.C.C. consumer goods are those goods that "are used or bought for use primarily for personal, family or household purposes."[23] An item may be a consumer good in the hands of a householder but "equipment" in the hands of a businessperson. Goods are classified according to the principal use to which a particular item is put.

Under Magnuson-Moss, however, the classification is made from the vantage point of the seller or manufacturer. It does not matter how a particular buyer uses the goods as long as such goods are "normally used" for consumer purposes. Under the FTC interpretation of the Act even a small amount of "normal" consumer use makes the entire product line subject to the Act. The FTC requires only that "an appreciable portion" of a product class be sold for consumer purposes.[24] Ambiguities are to be

20. *Id.* § 110(d)(1), 15 U.S.C. § 2310(d)(1). A service contract is a written contract "to perform, over a fixed period of time or for a specified duration, services relating to maintenance or repair" of a consumer product. *Id.* § 101(8), 15 U.S.C. § 2301(8). Thus, the service contract can be entered into before or after the sale of the product and need not be part of the basis of the bargain.

21. *Id.* § 101(3), 15 U.S.C. § 2301(3).

22. *Id.* § 101(1), 15 U.S.C. § 2301(1).

23. U.C.C. § 9-109.

24. 42 Fed. Reg. 36,112, 36,115 (1977) (to be codified in 16 C.F.R. § 700.1(a)). *See* Federal Trade Commission, Magnuson-Moss Warranty Act Implementation and Enforcement Policy, 40 Fed. Reg. 25,721, 25,722 (1975): "[W]here an appreciable portion of a product

resolved in favor of coverage. Accordingly, agricultural products that have a limited but regular household use in gardening and similar activities are "consumer products," whether used by a farmer or the suburban Sunday gardener.[25] Dual use property that serves both personal and business purposes, such as typewriters and cars, is subject to the Act.[26]

This contrast in definitions highlights the fact that the Magnuson-Moss definition was designed to allow sellers some degree of certainty as to which products will be subject to the Act. Although the breadth of the Magnuson-Moss definition allows some persons who are not consumers to utilize the federal warranty protections, this is not an undesirable result. It would be anomalous to protect householders who buy a particular product but not businesspersons who buy precisely the same product. Furthermore, although the Magnuson-Moss definition can be criticized as inconsistent with the intent behind the Act, since it leaves some consumers unprotected, it is broad enough to take the great majority of consumers under its wing.

The question whether fixtures are "consumer products" presents special problems. Although the Act restricts consumer products to personal property, it includes property "intended to be attached to or installed in any real property without regard to whether it is so attached or installed."[27] Thus, fixtures such as hot water heaters and air conditioners continue to be covered under the Act when incorporated into a dwelling, even though under the common law they have become a part of the real property.[28]

The FTC has attempted to clarify the Act's treatment of fixtures, distinguishing between products sold over-the-counter and products sold already installed as part of real estate which is being transferred. All products sold over-the-counter are consumer products, even building materials such as nails, bricks, and shingles which will be incorporated into a structure.[29] The theory is that the product is still personal property, and

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category is normally sold to consumers for personal, family, or household purposes, . . . all warranties and service contracts applicable to such products must conform with the Act." *See also FTC Staff Explains Details of Magnuson-Moss Warranty Act*, ANTITRUST & TRADE REG. REP. [BNA] No. 759, A-1 at A-1 (1976).

The Implementation and Enforcement Policy statement was published by the FTC to provide interim guidance during the initial implementation of the Act. In setting forth its final interpretations (to be codified in 16 C.F.R. part 700), the FTC indicated that "[t]he fact that some items from the earlier statement are omitted from these interpretations does not mean that the Commission no longer holds these views." 42 Fed. Reg. 36,112, 36,112 (1977).

In its interim statement, the FTC suggested that "nothing in the Act prohibits a limitation or elimination of coverage where the product is put to commercial, rental, or other use not described in section 101(1)." FTC, Magnuson-Moss Warranty Act Implementation and Enforcement Policy, 40 Fed. Reg. 25,721, 25,722 (1975). This seems inconsistent with the language of the statute. The FTC did not include this interpretation in its final interpretations. *See* 42 Fed. Reg. 36,112 (1977). Thus it is not clear whether it continues to hold this view.

25. 42 Fed. Reg. 36,112, 36,115 (1977) (to be codified in 16 C.F.R. § 700.1(b)).
26. *Id.* (to be codified in 16 C.F.R. § 700.1(a)).
27. Magnuson-Moss Warranty Act § 101(1), 15 U.S.C. § 2301(1) (Supp. V 1975).
28. 42 Fed. Reg. 36,112, 36,115 (1977) (to be codified in 16 C.F.R. § 700.1(c), (d)).
29. *Id.* (to be codified as 16 C.F.R. § 700.1(e)).

hence a "consumer product," at the time it is sold. This approach follows the U.C.C., which includes an item in the definition of "goods" subject to Article 2 warranties if it is "movable at the time of identification to the contract for sale."[30]

This approach presents difficulties when the seller installs the product. Such a transaction could be classified either as an over-the-counter sale of personal property coupled with the provision of installation services, or as a sale of real estate construction services alone. The FTC has stated that the goods remain consumer products when used "in connection with the improvement, repair, or modification of a home" but that they are not consumer products "where a consumer contracts with a builder to construct a home, a substantial addition to a home, or other realty (such as a garage or an in-ground swimming pool) . . . ."[31]

A different test applies to products already installed in a home and sold as part of the real estate. The FTC does not consider such products consumer products if they are "integral component parts of the structure,"[32] such as wiring, plumbing, and ducts. According to the FTC, "[t]he key lies in the distinction between the physical separateness of an items [sic] and the separate function of an item." It is not enough for an item to have a physically separate identity. For Magnuson-Moss to apply, the item must be "*functionally* separate from the realty."[33] The FTC would classify as a consumer product a thermostat but not a light fixture; an oven hood, but not a shower stall; a boiler, but not a radiator; and a whirlpool bath, but not a bidet.[34] As the examples suggest, the FTC's distinction is likely to be difficult to apply.

This branch of the FTC approach differs from the U.C.C. Under Article 2, fixtures are subject to the warranty rules for goods only if they are to be severed from the land by the seller or if they are sold apart from the land and are "capable of severance without material harm" to the realty.[35] Article 2 contains no rules for determining whether goods sold with the realty, without severance, should be treated as goods or real property. By its silence the U.C.C. seems to assume that the goods would be treated as part of the realty.

The Magnuson-Moss Act assumes that the transactions it covers are subject to the U.C.C. A key provision of the Act prohibits disclaimers of implied warranties on the assumption the product will be subject to the U.C.C. implied warranty of merchantability if efforts at disclaimer are

30. U.C.C. § 2-105(1).

31. 42 Fed. Reg. 36,112 36,115 (1977) (to be codified as 16 C.F.R. § 700.1(e), (f)).

32. *Id.* (to be codified as 16 C.F.R. § 700.1(d)).

33. FTC Advisory Opinion, Home Owners Warranty Corp. & Nat'l Ass'n of Home Bldrs., 3 TRADE REG. REP. (CCH) ¶ 21,245, at 21,140 (1976).

34. *Id.*

35. U.C.C. § 2-107.

prevented.[36] This assumption may be erroneous in the case of fixtures, for the expansive Magnuson-Moss definition probably covers products the U.C.C. would classify as real estate. It is possible to extend the U.C.C. warranty provisions by analogy to cover sales of fixtures as part of the real estate, but the extent to which this approach will be followed is unclear. If real estate law, rather than the U.C.C., applies to the transaction there may be no implied warranties.[37]

These troublesome distinctions between realty and personalty could have been avoided, and greater protection afforded the consumer, if the Act had been extended to cover all consumer products, whether real or personal property. Under this approach, a consumer's home, as well as all the goods installed in or attached to the structure, would be a "consumer product" within the meaning of the Act. This change would not drastically alter state law warranty doctrine. Magnuson-Moss affects express warranty liability only if the seller gives a written warranty within the meaning of the Act. It affects implied warranty liability only if state law recognizes the existence of an implied warranty. Thus, extending Magnuson-Moss to cover realty would not create warranties covering real estate where none existed before. But it would have the salutary effect of subjecting those who sell realty to consumers to the same rules of warranty disclosure and minimum warranty standards that all other sellers to consumers must meet.

B. Written Warranty

A necessary condition to much consumer litigation under the Act will be a showing of the existence of a written warranty as defined in the Act. Obviously, it will be essential in suits for breach of written warranty. Such a showing will also be important in consumer suits for "violations" of the Act, since most of the Act's substantive obligations fall upon persons who have given written warranties. The Act defines a written warranty as:

> (A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or
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> (B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the

36. Magnuson-Moss Warranty Act § 108, 15 U.S.C. § 2308 (Supp. V 1975).

37. *See* Voight v. Ott, 86 Ariz. 128, 341 P.2d 923 (1959) (air conditioner is part of realty and thus not subject to implied warranties of quality); Gable v. Silver, 258 So.2d 11 (Fla. Dist. Ct. App.), *aff'd per curiam*, 264 So. 2d 418 (Fla. 1972) (air conditioner is part of realty and not subject to U.C.C. warranties, but implied real estate warranties apply).

bargain between a supplier and a buyer for purposes other than resale of such product.[38]

This definition partially corresponds to the U.C.C. express warranty definition. The U.C.C. also creates an express warranty where there is an "affirmation of fact" or a "promise" and provides that the express warranty can only exist where it is made "part of the basis of the bargain."[39]

The Magnuson-Moss definition departs from the U.C.C. in important respects, however. It does not include oral warranties, which are recognized under the U.C.C. to the extent they are not barred by an integration clause in the parties' writings.[40] Furthermore, the Magnuson-Moss definition conspicuously eliminates the U.C.C. language that makes it unnecessary to use formal words such as "warranty" or "guarantee" or to have a "specific intention to make a warranty."[41] It fails to include the U.C.C. provision that permits the creation of warranties from a description of the goods or use of a sample or model.[42] To have a written warranty under Magnuson-Moss there must be either (1) a specific undertaking by the warrantor to remedy defects, or (2) an affirmation of fact or promise that the product "is defect free or will meet a specified level of performance over a specified period of time." The insistence on either a "specific undertaking" or a representation as to a "specified level of performance" indicates that some conduct that can give rise to warranty liability under the U.C.C. will not be deemed to create "written warranties" under Magnuson-Moss. For example, under the U.C.C. the statement "This cabinet complies with HUD MPS 611-1.1." creates an express warranty. It is an affirmation of fact that the cabinet will meet the HUD standard. The FTC has advised, however, that this language does not constitute a written warranty under Magnuson-Moss because the statement does not promise a "specified level of performance for a specified period of time."[43] Similar conclusions could be reached as to U.C.C. warranties that arise from general language of description or from the use of a sample, if not accompanied by the required promise.[44]

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38. Magnuson-Moss Warranty Act, § 101(6), 15 U.S.C. § 2301(6) (Supp. V 1975).

39. U.C.C. § 2-313.

40. The FTC has indicated, however, that although suppliers who simply sell consumer products covered by written warranties offered by others are not themselves warrantors, they may obligate themselves under the Act through oral representations. The determination turns on state law rules of "adoption." 42 Fed. Reg. 36,112, 36,116 (1977) (to be codified in 16 C.F.R. § 700.4). See text accompanying notes 72-73 *infra*.

41. U.C.C. § 2-313(2).

42. *Id.* § 2-313(1)(b), (c).

43. *FTC Staff Letters Explain Aspects of Consumer Products Warranty Law*, ANTITRUST & TRADE REG. REP. (BNA) No. 729, A-1 at A-2 (1975).

44. The following cases involved U.C.C. express warranties of sample or description which probably would not constitute written warranties under Magnuson-Moss: Blockhead Inc. v. Plastic Forming Co., 402 F. Supp. 1017 (D. Conn. 1975) (samples of molded plastic wiglet cases); Interco Inc. v. Randustrial Corp., 533 S.W.2d 257 (Mo. 1976) (floor covering would "absorb considerable flex without cracking"); Rinkmasters v. City of Utica, 75 Misc. 2d 941,

This difference between the U.C.C. and Magnuson-Moss reflects the different purposes of the two statutes. The objective of the U.C.C. is protection of the bargain, as found from all the facts and circumstances of the transaction. The purpose of Magnuson-Moss, on the other hand, is to prevent warranty deception. It is mainly intended to deal with sellers passing off something as a warranty which either is illusory or disclaims more liability than it creates.[45]

The Magnuson-Moss Act contains a limited exemption for "statements or representations which are similar to expressions of general policy concerning customer satisfaction and which are not subject to any specific limitations."[46] "Satisfaction guaranteed or your money back" is one example of a statement within the exemption.[47] Such statements are not subject either to the federal minimum warranty standards or to the standards for disclosure of the terms and conditions of warranties. Since the general policy statements should be readily understood as such, they need not be designated as "full" or "limited" warranties.

This exemption for statements of general policy does not, however, shield the seller from the enforcement provisions of the Act. If the statement of general policy otherwise qualifies as a "written warranty," private enforcement rights for breach of a written warranty are available.[48] Statements such as "satisfaction guaranteed or your money back" could be classified as warranties on the theory that the statement is an undertaking to remedy defects by returning the customer's money. In addition, the average consumer might interpret "Guaranteed" to mean that the product is "defect free." The FTC has taken the position that use of the word "guarantee" or "warranty," by itself, may be sufficient to create a warranty subject to the Act.[49] There is support for this view in section 110(c)(2) which, in defining deceptive warranties, assumes a warranty can be "created by the use of such terms as 'guarantee' or 'warranty.' "[50] By contrast it is not necessary to employ such elaborate reasoning to find a U.C.C. warranty. The existence of the warranty does not turn on the use of magic words. Even general

348 N.Y.S.2d 940 (City Ct. 1973) (illustrations in catalogue); Lamb v. Bangart, — Utah 2d —, 525 P.2d 602 (1974) ("ten purebred Charolais heifers (daughters of the above described bull)").

45. *See* H.R. REP. NO. 1107, 93d Cong., 2d Sess. 24, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702, 7706.

46. Magnuson-Moss Warranty Act § 103(b), 15 U.S.C. § 2303(b) (Supp. V 1975). *See also* 42 Fed. Reg. 36,112, 36,116 (1977) (to be codified as 16 C.F.R. § 700.5).

47. H.R. REP. NO. 1107, 93d Cong., 2d Sess. 37, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702, 7719.

48. The limitation in § 103, 15 U.S.C. §§ 2303 (Supp. V 1975), applies only to §§ 102-104 of the Act, 15 U.S.C. §§ 2302-2304 (Supp. V 1975).

49. *FTC Staff Explains Details of Magnuson-Moss Warranty Act*, ANTITRUST & TRADE REG. REP. (BNA) No. 759, A-1 at A-2 (1976). *See also* Federal Trade Commission, Magnuson-Moss Warranty Act Statement of Implementation and Enforcement Policy, 40 Fed. Reg. 25,721, 25,722 (1975).

50. 15 U.S.C. § 2310(c)(2) (Supp. V 1975).

assurances that do not constitute promises of specific levels of performance can be viewed as express representations that the described products will meet minimum standards of merchantability.

Finally, the Magnuson-Moss definition of written warranty requires a *sale* of the consumer product to a buyer "for purposes other than resale of such product." Thus, like the U.C.C.,[51] the Act by its terms does not apply to leases of goods, nor does it apply to service transactions which do not involve the sale of a consumer product. The U.C.C. has been extended by analogy to both types of transactions.[52] The federal act lacks the flexibility to bring leases under its coverage, but since the rendition of services may also involve the sale of a product, if only incidentally, there is room for case law development.[53] If the federal coverage is broader than the U.C.C., however, there will be transactions where the Magnuson-Moss warranty standards apply but there are no implied warranties as a matter of state law.

C. Consumer: Horizontal Privity

The Magnuson-Moss Act gives the right to sue to consumers, and defines a consumer as:

> a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).[54]

This language creates four classes of persons who qualify as consumers: (1) buyers other than for resale; (2) certain transferees; (3) persons covered by the terms of the warranty; and (4) persons entitled to sue under state law. The striking aspect of these categories is that none is limited to persons who buy for "personal, family, or household purposes." The doctor who purchases a stereo for the office reception area, the accounting firm that purchases portable typewriters for its employees, and even the farmer who uses a pesticide spray, are consumers if some of the buyers of these products use them for personal, family, or household purposes.[55]

The categories are reasonably self-explanatory, and may overlap. The first category, "buyers other than for purposes of resale," includes, as

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51. Sections 2-313, 2-314, and 2-315 of the U.C.C. refer to warranties by a seller. *See* U.C.C. § 2-313, Official Comment 2.

52. *See* Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957).

53. *See FTC Staff Explains Details of Magnuson-Moss Warranty Acts*, ANTITRUST & TRADE REG. REP. (BNA) No. 759, A-1 at A-1 (1976) (undercoating applied to a car is covered by the Act).

54. Magnuson-Moss Warranty Act § 101(3), 15 U.S.C. § 2301(3) (Supp. V 1975).

55. See text accompanying notes 24-26 *supra*.

noted above, some purely commercial buyers. The fourth category, persons entitled "under state law" to enforce the warranty, makes clear that the scope of the Magnuson-Moss enforcement provisions is at least as broad as that of state law. The meaning of the third category, "persons entitled by the terms of such warranty" to enforce the warranty, could in particular cases be unclear. In most cases, however, the third category will be just a subcategory of the fourth. When the written warranty terms mention persons entitled to enforce, general principles of state contract law would give those persons a right to enforce.

The second category, "any person to whom such product is transferred during the duration of an implied or written warranty," is the most expansive. Although this language appears to reach beyond sales of consumer products to include transactions in which a merchant leases goods to consumers or in which the consumer is only a bailee, such a reading is erroneous. The definitions of written and implied warranties still require a *sale* between a supplier and a buyer.[56] Thus, this portion of the definition of "consumer" must be viewed as referring to transferees after an initial sale of the product. There must be an initial buyer who buys "for purposes other than resale" of the product.

Once there is an initial qualifying buyer, any subsequent transferee becomes a "consumer." There is no requirement that the transferee acquire for "personal, family, or household purposes." The transferee can even be a dealer who buys or takes the product in trade to resell it. Under this construction, a doctor who purchases a stereo for use in the office reception room is a consumer since the doctor is a "buyer (other than for purposes of resale)" of a consumer product, and any transferee from the doctor, including the stereo dealer who takes it in trade, is a consumer as well.

The broad definition of consumer in the Magnuson-Moss Act may overturn state law doctrines of privity of contract. The U.C.C. offers three alternatives to define the beneficiaries to whom warranties extend.[57] Under the most liberal, the U.C.C. warranties, express and implied, extend "to any person who may reasonably be expected to use, consume or be affected by the goods" and who is injured by the breach.[58] The most restrictive alternative limits the warranty to "any natural person who is in the family or household of the buyer or who is a guest in his home."[59]

Magnuson-Moss seems to have dispensed with any horizontal privity requirement. A consumer is defined as "*any* person to whom such [consumer] product is transferred during the duration of an implied or written warranty,"[60] and all consumers are given the right to sue for breach

56. Magnuson-Moss Warranty Act § 101(6), (7), 15 U.S.C. § 2301(6), (7) (Supp. V 1975).
57. U.C.C. § 2-318.
58. *Id.* Alternative C.
59. *Id.* Alternative A.
60. Magnuson-Moss Warranty Act § 101(3), 15 U.S.C. § 2301(3) (Supp. V 1975) (emphasis added).

of warranty. Thus, if a transferee of a person who did not buy for resale discovers a defect within the warranty period, the transferee should be able to maintain an action for breach of warranty. At least some legislative history supports this broad reading of the definition of consumer.[61]

The definition of a written warranty also supports this view. A "written warranty" requires a promise, affirmation, or undertaking that has become "part of the basis of the bargain between a supplier and a buyer for purposes other than resale."[62] Although this language is taken from the U.C.C.,[63] it is rephrased slightly more expansively. Magnuson-Moss refers to the "basis of the bargain between *a* supplier and *a* buyer for purposes other than resale." This phrasing suggests that the person bringing suit makes out a cause of action by showing that the promise, affirmation, or undertaking was part of the basis of the bargain of *some* buyer, no matter who, as long as that purchase was not for the purpose of resale. Under this view, the person suing need not show the warranty was part of the basis of *his* bargain, as the U.C.C. requires.

Under such a literal reading, no distinction would be drawn between an action on a full warranty and one on a limited warranty, nor between an action on a written warranty and one on an implied warranty. Nevertheless, other provisions in the Act suggest it may be necessary to draw these distinctions.

The Act contains an express provision removing the privity bar for full warranties, but no comparable provision applies to limited warranties.[64] This difference may indicate an intention to leave traditional doctrines of privity undisturbed for limited warranties. Such a reading would be consistent with the Act's rigorous distinction between full warranties, to which the federal minimum standards apply, and limited warranties, which are defined exclusively by state law and the terms of the warranty. Only the disclosure requirements, the prohibition against disclaiming implied warranties, and the antitying restrictions are applicable to limited warranties. The Act imposes no substantive requirements for limited warranties. All of this could suggest that state law rules of privity should apply to limited warranties.

State law rules of privity may also still apply to implied warranties, for the Act leaves the definition of implied warranty liability to state law. There is little in the Act to suggest that Congress intended to change the law of privity with respect to implied warranties. In "extending" the minimum federal warranty duties, section 104(b)(4) says nothing about the scope of implied warranties. The Act does prohibit the imposing of "any limitation

61. *See* S. REP. No. 151, 93d Cong., 1st Sess. 12 (1973); 119 CONG. REC. 29,487 (1973); Note, *Horizontal Privity Under the Magnuson-Moss Warranty Act: A Practitioner's Guide*, 51 NOTRE DAME LAW., 775 (1976).

62. Magnuson-Moss Warranty Act § 101(6), 15 U.S.C. § 2301(6) (Supp. V 1975).

63. U.C.C. § 2-313(1).

64. Magnuson-Moss Warranty Act § 104(b)(4), 15 U.S.C. § 2304(b)(4) (Supp. V 1975).

on the duration of any implied warranty on the product" when a full warranty is given,[65] but this duty is dependent on the existence of an implied warranty, which is defined by state law. An FTC interpretation allows the warrantor to define the duration of a written warranty in terms of first purchaser ownership, and thus to cut off the rights of subsequent transferees.[66] This interpretation suggests that state law could limit the duration of the warranty to the first purchaser, particularly in the case of an implied warranty. But since the Act expressly extends the benefits of the warranty to any transferee, this interpretation is of questionable validity.

Poor drafting thus leaves open the possibility that a subsequent transferee may have a right to sue only on a full written warranty and not on a limited or implied warranty. Despite the inclusion of subsequent transferees in the definition of consumer irrespective of the type of warranty involved, Congress expressly rejected the horizontal privity bar only for full warranties.

It is unfortunate the Act does not clearly reject the horizontal privity doctrine in all cases. In dealing with consumer products, much can be said in favor of allowing the warranty to run with the product regardless of who subsequently acquires it. Such a result protects the bargain of the original consumer buyer who bought a warranted product and who should be able to pass title to a product of similar quality. It protects the expectations of the transferee who bought a product that was under warranty at the time of transfer and that the transferee could reasonably have believed met the standard represented in the warranty. It also comports with the common understanding of the mass-merchandising approach in selling consumer goods. There is little reason to suppose that the seller initially would have been any less willing to sell the product on the same warranty terms to one consumer rather than another. Giving effect to the horizontal privity defense thus only gives the seller a windfall in not having to respond to otherwise legitimate warranty claims. Courts could avoid privity requirements by a literal reading of the Act's definition of "consumers," which embraces all transferees. This reading would be consistent with the consumer-oriented goals of the statute.

D. Suppliers and Warrantors: Vertical Privity

Purchasers who buy products from independent retail outlets do not have direct contractual relationships with the manufacturers of the products. In this situation the consumer is sometimes said to lack vertical privity of contract. The question thus arises whether the purchaser of a defective product can sue the manufacturer for breach of warranty notwithstanding the lack of privity.

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65. *Id.* § 104(a)(2), 15 U.S.C. § 2304(a)(2).

66. 42 Fed. Reg. 36,112, 36,117 (1977) (to be codified in 16 C.F.R. §§ 700.3(c), 700.6(b)).

Because the U.C.C. has not taken a decisive position on the issue of the need for vertical privity,[67] a complex case law has developed. When an express warranty is involved, either from advertising, from representations in the label, or from brochures or other literature accompanying the product, the defense of lack of privity has failed.[68] When the issue is breach of implied warranty, however, the outcome is less certain. Recovery has been allowed when it is possible to find an express warranty running to the consumer that accompanies the implied warranty.[69] In other cases, courts have sometimes distinguished the types of injury involved, recovery for personal injury being more likely to surmount privity hurdles than pure economic loss.[70] The case law is further confused by the interplay between tort concepts of product liability and U.C.C. warranty doctrine.[71] Unfortunately, the Magnuson-Moss Act does not clarify this confused situation.

Magnuson-Moss gives consumers a cause of action for breach of warranty against "warrantors" and "suppliers." A supplier is "any person engaged in the business of making a consumer product directly or indirectly available to consumers"; a warrantor is a supplier or other person who gives or is liable under a warranty.[72] This definition was meant to include everyone in the chain of distribution.[73] Yet the sweeping nature of the definition is not enough to demonstrate that the vertical privity barriers have been hurdled. Suppliers are liable for breach of warranty only if they are obligated under a written or implied warranty.

Magnuson-Moss imposes liability for breach of a written warranty only if the promise or undertaking has become "part of the basis of the bargain."[74] This requires the warrantor to make the representation to *some* buyer, although the buyer to whom the representation is made need not be the party who is suing.[75] This "basis of the bargain" language comes from the U.C.C.[76] There it is construed to permit liability for express warranty even in circumstances where there is no direct contract between manufacturer and buyer. For example, courts have held advertising, a representation on

67. *See* U.C.C. § 2-318, Official Comment 3. Alternative A takes no position on the vertical privity issue. Alternatives B and C may be read as eliminating the need for vertical privity for the person protected by those provisions.

68. *See* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 335 (1972).

69. *E.g.*, Ford Motor Co. v. Lee, 137 Ga. App. 486, 224 S.E.2d 168 (1976).

70. *See, e.g.*, Berry v. G. D. Searle & Co., 56 Ill. 2d 548, 309 N.E.2d 550 (1974); Hiles Co. v. Johnston Pump Co., — Nev. —, 560 P.2d 154 (1977) (dicta); Foremost Mobile Homes Mfg. Corp. v. Steele, 506 S.W.2d 646 (Tex. App. 1974).

71. *See, e.g.*, Kassab v. Central Soya, 432 Pa. 217, 246 A.2d 848 (1968).

72. Magnuson-Moss Warranty Act § 101(4), (5), 15 U.S.C. § 2301(4), (5) (Supp. V 1975).

73. H. R. REP. NO. 1107, 93d Cong., 2d Sess. 35, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702, 7717.

74. Magnuson-Moss Warranty Act § 101(6), 15 U.S.C. § 2301(6) (Supp. V 1975).

75. See text accompanying notes 52-53 *supra*.

76. U.C.C. § 2-313(1).

a product label, or a promise in a customer brochure to be part of the basis of a consumer's bargain.[77]

In light of Magnuson-Moss's broad definition of a warrantor, its "basis of the bargain" concept should be as broad as that under the U.C.C. Because the Magnuson-Moss definition of written warranty is not as broad as that of express warranty in the U.C.C., however, the other requirements of the Act may often not be met when there is no direct contract between the manufacturer and the consumer. The Act requires a writing. At least some imagination is needed to view radio and television advertising as a "writing." Additionally, the representation must promise "a specified level of performance over a specified period of time" or must promise the product is "defect free."[78] Advertising may not be specific enough to meet this test.[79]

When the manufacturer expressly gives a written warranty intended to run with the product to the consumer, as in the case of an express warranty contained in an instruction manual, there should be no problem in recognizing the right of the consumer to enforce the warranty. The warranty promise should be viewed as part of the basis of the consumer's bargain under Magnuson-Moss, just as it would be under the U.C.C. The Act specifically imposes this result in the case of the full warranty by making the warrantor's duty to remedy extend to all consumers.[80] A similar result should be reached for limited warranties simply by finding that the promise became part of the basis of the bargain.

It is still possible, however, for a manufacturer to give an express warranty to a distributor without having the warranty extend to consumers.

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77. Hauter v. Zogarts, 14 Cal. 3d 104, 114-17, 534 P.2d 377, 383-85, 120 Cal. Rptr. 681, 687-89 (1974) (product label); Hawkins Constr. Co. v. Matthews Co., 190 Neb. 546, —, 209 N.W.2d 643, 654 (1973) (brochure); Rinkmasters v. City of Utica, 348 Misc. 2d 941, 348 N.Y.S.2d 940 (City Ct. 1973); *see* Pritchard v. Liggett & Meyers Tobacco Co., 295 F.2d 292 (3d Cir. 1961) (media advertisements); Antonucci v. Stevens Dodge, Inc., 73 Misc. 2d 173, 340 N.Y.S.2d 979 (Civ. Ct. N.Y. 1973).

78. The FTC, for example, has said statements such as "The Dutch Masters . . . is your guarantee that all the skill of expert paint making and the finest ingredients obtainable go into every package" and "resists scuffs, alcohol, boiling water, cosmetics, moderate heat and stains; cleans easily with a solution of mild soap and water" do not constitute written warranties. *FTC Staff Letters Explain Aspects of Consumer Product Warranty Law*, ANTITRUST & TRADE REG. REP. (BNA) No. 729, A-1 at A-2 (1975); *FTC Staff Explains Details of Magnuson-Moss Warranty Act*, ANTITRUST & TRADE REG. REP. (BNA) No. 759, A-1 at A-2 (1976). Under the U.C.C. the second statement would qualify as an express warranty since it is an affirmation of fact. Even the first statement could be viewed as an express warranty in the nature of a general guarantee of quality. *See* U.C.C. § 2-314, Official Comment 4.

79. Nothing in the Act, however, expressly excludes advertising materials from coverage. Although the "basis of the bargain" requirement will impose some limitation, it is not absolute since advertising can become part of the basis of the bargain. *See, e.g.*, Midland Forge Inc. v. Letts Indus. Inc., 395 F. Supp. 506 (N.D. Iowa 1975). An earlier version of the legislation defined written warranty in terms of representations made "at the time of sale." S. 356, 93d Cong., 1st Sess. § 101(11) (1973). *See* S. REP. No. 151, 93d Cong., 1st Sess. 14 (1973). The final legislation uses the broader phrase "in connection with the sale." Magnuson-Moss Warranty Act § 101(6), 15 U.S.C. § 2301(6) (Supp. V 1975).

80. Magnuson-Moss Warranty Act § 104(d), 15 U.S.C. § 2304(d) (Supp. V 1975).

There cannot be a Magnuson-Moss written warranty unless it becomes part of the basis of the bargain of a buyer who purchases for purposes other than resale. A retailer buys for resale, so a warranty that extends only to the retailer is not within Magnuson-Moss. Similarly, the supplier of component parts may safely give a written warranty that is limited to the manufacturer.[81]

When liability for implied warranty, as opposed to written warranty, is involved, the Act's effect on state law vertical privity doctrines is less clear. Implied warranty liability may be relevant in two possible situations. The first is where no Magnuson-Moss written warranty was made; the second is where a Magnuson-Moss written warranty was given, but it is more restricted in scope than the U.C.C. implied warranty of merchantability or fitness for particular purpose. In the first case, where no Magnuson-Moss written warranty was given, the Act probably has no effect on state law privity rules. The language of the Act permitting the consumer to bring suit for the failure of a warrantor to honor an implied warranty could be read broadly to provide a cause of action even when there is no vertical privity. There can be no suit on an implied warranty, however, unless such a warranty has arisen. Since the Act defines an implied warranty as a liability "arising under state law,"[82] state vertical privity rules continue to control in suits of this kind under the Act.

In the case where a Magnuson-Moss written warranty has been given, the resolution of the issue is less clear. In this second case, the Act's prohibition against implied warranty disclaimers applies. Having made a written warranty, the manufacturer cannot disclaim implied warranty liability. Nevertheless, the Act still provides that the creation of implied warranty liability is a matter of state, not federal law. Thus in this case also, state law rules of vertical privity would seem to control. On the other hand, the case where a written warranty has been given fits the statutory language that allows a "consumer" to sue a "warrantor" for breach of "implied warranty." Furthermore, it would be anomalous to hold a manufacturer responsible to consumers on a written warranty, but at the same time allow the manufacturer to escape responsibility for implied warranty. This anomaly has led some jurisdictions to find liability for implied warranty whenever an express warranty exists.[83] This reasoning is especially forceful in connection with Magnuson-Moss warranties because the Act was drafted on the premise, clearly seen in the Act's prohibitions against disclaimers,[84] that there

81. 42 Fed. Reg. 36,112, 36,116 (1977) (to be codified in 16 C.F.R. § 700.3(6)).

82. Magnuson-Moss Warranty Act § 101(7), 15 U.S.C. § 2301(7) (Supp. V 1975). *See* S. REP. No. 151, 93d Cong., 1st Sess. 21 (1973).

83. See note 56 *supra*. In these jurisdictions, even if Magnuson-Moss has not overruled state law rules of vertical privity for suits under the Act, vertical privity would not be a problem in a Magnuson-Moss suit alleging a breach of implied warranty.

84. Magnuson-Moss Warranty Act § 108, 15 U.S.C. § 2308 (Supp. V 1975).

was a major need to return the protections of implied warranty to consumers in order to give substance to sellers' warranty obligations.[85] Since the Act does not compel manufacturers to give written warranties, the policy reasons for holding them to the implied warranty are strong when they have chosen to provide warranties in writing. The implied warranty reinforces the written warranty obligation the manufacturer expressly undertakes and makes certain the warrantor is held to minimal standards of warranty fairness.

In cases where the lack of vertical privity prevents warranty recovery against the manufacturer, there may nevertheless be recovery against the retailer who sold the product directly to the consumer. Magnuson-Moss imposes an independent liability upon the retailer who gives an independent written warranty. Even the retailer who does not give a written warranty is doubtless a merchant whom the U.C.C. will hold to the standards of the implied warranty of merchantability. Of course, if the retailer is careful to refrain from giving a Magnuson-Moss written warranty, there is nothing to prevent the retailer from effectively disclaiming the warranty of merchantability as a matter of state law.

When manufacturers give written warranties on their products, retailers are not obligated on them as a matter of state law unless they adopt them as their own.[86] It is easy to imagine retailer conduct sufficient to amount to an adoption. The same result should obtain under Magnuson-Moss, but there is language in the Act that lends itself to a different interpretation. The Act states:

> For purposes of this section, only the warrantor actually making a written affirmation of fact, promise, or undertaking shall be deemed to have created a written warranty, and any rights arising thereunder may be enforced under this section only against such warrantor and no other person.[87]

This language should not allow the retailer who has clearly adopted the manufacturer's warranty to evade responsibility for that warranty. In such a case, the retailer has "actually made" a warranty and should be held responsible for it.

II

NATURE OF THE CAUSE OF ACTION

The Magnuson-Moss Act creates four causes of action for consumers. They may sue for failure "to comply with any obligation [1] under this title,

85. *See* S. REP. No. 151, 93d Cong., 1st Sess. 6-7 (1973).

86. 42 Fed. Reg. 36,112, 36,116 (1977) (to be codified as 16 C.F.R. § 700.4). *See* Gilliam v. Indiana Nat'l Bank, — Ala. App. —, 337 So.2d 352 (1976); Courtesy Ford Sales Inc. v. Farrior, 53 Ala. App. 94, 298 So.2d 26, *cert. denied*, 292 Ala. 718, 298 So.2d 34 (1974); Bill McDavid Oldsmobile Inc. v. Mulcahy, 533 S.W.2d 160 (Tex. Civ. App. 1976).

87. Magnuson-Moss Warranty Act § 110(f), 15 U.S.C. § 2310(f) (Supp. V 1975).

or [2] under a written warranty, [3] implied warranty, or [4] service contract . . . ."[88]

A. *Breach of Written Warranty*

When the warranty is a limited warranty, proof of breach under Magnuson-Moss is similar to that under the U.C.C. There must be proof that (1) a warranty was made; (2) the warranty was breached; (3) injury occurred; and (4) the breach of warranty proximately caused the injury.

In the case of a full warranty, however, the Magnuson-Moss Act relaxes the proof required under the U.C.C. The federal minimum standards require a warrantor under a full warranty to remedy any consumer product in which there is "a defect, malfunction, or failure to conform with such written warranty."[89] A consumer suing under a full warranty need not prove a breach of the written warranty, but need only establish the existence of a product defect or malfunction.[90] Thus, Magnuson-Moss seems to impose liability for all "defects" regardless of whether they are covered by the express language of the warranty.

An example may illustrate the point. A stereo manufacturer offers a written warranty in connection with a stereo receiver and speaker combination, guaranteeing that the receiver will have a 100 watt output per channel. In fact, the receiver has an output of only 85 watts per channel but this is sufficient to produce an acceptable level of performance. There is no product "defect" in this case, but there is a breach of the manufacturer's express promise. On the other hand, if the manufacturer warrants the receiver to have only a 10 watt output per channel, but this output is insufficient to drive the speakers without serious sound distortion, there is no breach of the written warranty if the receiver in fact produces 10 watts, but the product combination does seem to be defective. To allow the manufacturer to label his warranty in this last example as a "full" warranty without responsibility for the insufficiency of the power output would be misleading.

The stereo example illustrates the need for a standard that defines product defects. Magnuson-Moss, unfortunately, does not provide such a standard. "Defective product" is a term familiar in product liability litigation, but there the standard is whether the product is "unreasonably dangerous."[91] That standard is not appropriate for warranty disputes, where breach of warranty can exist even when the product is harmless. The best solution

88. *Id.* § 110(d)(1), 15 U.S.C. § 2310(d)(1).

89. *Id.* § 104(a)(1), 15 U.S.C. § 2304(a)(1).

90. The choice of the language "defect, malfunction, *or* failure to conform" seems deliberate, as it appears in other parts of the Act as well. *Id.* § 104(b)(1), (c), 15 U.S.C. § 2304(b)(1), (c).

91. RESTATEMENT (SECOND) OF TORTS § 402, Comment g, at 351 (1965). *See* W. PROSSER, TORTS 658-662 (4th ed. 1971).

would be to look to the standards supplied by the U.C.C. implied warranty of merchantability.[92] These standards aptly describe a product free of defects,[93] and are more easily administrable than would be a completely new set of standards. Following this approach makes the Magnuson-Moss full warranty an amalgam of the U.C.C. implied and express warranties.

The Magnuson-Moss Act, in requiring warrantors using full warranties to remedy defects and malfunctions, is not specific as to when the defect or malfunction must exist. Traditional warranty law requires the buyer to prove the product was defective *at the time of delivery*.[94] Failure to object to the quality of the product at that time, when the defect is readily discernible by an inspection of the product, will result in a waiver of the objection.[95]

Sometimes a warrantor will expressly promise that the goods will remain free from defects during the life of the warranty or that any defect, whenever it arises, will be repaired during the life of the warranty. It is in this popular sense that Magnuson-Moss defines the obligations of a warrantor under a full warranty.[96] The warrantor must remedy the product whenever a defect or malfunction occurs within the warranty period even if the product was free from defect at the time of delivery.[97] In fact, it can be argued that the Act uses warranty in this popular sense for both "full" and "limited" warranties. A written warranty, under the Act, is a promise or other representation that (1) the goods are defect free, or (2) a remedy will be provided if the goods fail to meet a specified level of performance, or (3) the goods will meet a specified level of performance over a specified period of time. It is not clear that either (2) or (3) requires the defect to have been in existence at the time of delivery of the product to the consumer.[98]

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92. U.C.C. § 2-314.

93. For example, in order for a good to be merchantable, it must be "fit for the ordinary purposes for which such goods are used. U.C.C. § 2-314(2)(c). If a good did not meet the standard it would also seem to be defective. Under this definition, the stereo combination would be defective if the sound is unacceptably distorted.

94. U.C.C. § 2-714(1). *See* J. WHITE & R. SUMMERS, *supra* note 68, at 272.

95. A buyer who accepts goods loses the right to reject them. U.C.C. § 2-607(2). The acceptance cannot be revoked if the buyer accepted the goods knowing about the defect unless the acceptance was on the assumption the defect would be cured. *Id.* Even an action for damages will be barred if the buyer fails to give notice of the defect within a reasonable time. *Id.* § 2-607(3)(a).

96. *See* Boyd, *The Federal Government Enters the Consumer Warranty Field*, 12 ARIZ. B.J. 20, 23 (1976).

97. Magnuson-Moss Warranty Act § 104(a)(1), 15 U.S.C. § 2304(a)(1) (Supp. V 1975).

98. Some legislative history supports the view that the product must be free from all defects during the warranty period. A Senate Report on an earlier version of the bill identified product reliability as a key consumer problem:

> Many warranty problems could be cured if products were made more reliable so that they lasted the length of the warranty period and beyond . . . .
>
> Under present marketing conditions the consumer has available to him little or no information about the product reliability potential of any consumer product he buys. He cannot look to the length of the warranty period as a possible indicator of product reliability because variance in warranty terms and conditions permits producers of less reliable products to compete on ostensibly the same terms of duration as producers of

The burden of proof under Magnuson-Moss may be affected by two other provisions. The first applies only to full warranties and seems to make product misuse an affirmative defense to be established by the warrantor.[99] If product misuse is a defense, the consumer's burden is eased. To make out a prima facie case the consumer need only show the existence of a defect during the warranty period. The second relevant provision is the antitying proviso, which generally prohibits the warrantor from conditioning the warranty upon the consumer using brand name labor or parts, unless the labor or parts are provided without charge.[100] This prohibition probably prevents the warrantor who declines to offer free labor or parts from requiring the consumer who uses other than authorized parts or service to prove the alternative service or parts were satisfactory. As a consequence, the warrantor bears the burden of establishing that the repair work was inept when repairs were done by others.

B. Breach of Implied Warranty

The Magnuson-Moss Act gives consumers a cause of action for breach of implied warranty.[101] The implied warranties covered by the Act are those created by state law.[102] Although the Act creates no new implied warranties, it does affect implied warranty liability by prohibiting warrantors from disclaiming implied warranties.[103]

Warrantors using a full warranty can neither limit the duration of nor disclaim implied warranty liability. For example, manufacturers who offer a one year full warranty on televisions may not disclaim or otherwise limit their liability for breach of the implied warranty of merchantability. That implied warranty, which arises automatically under the U.C.C. with the sale of a television, will be effective for the full four years of the U.C.C. statute of limitations.[104] The U.C.C. implied warranty, however, covers only defects that exist at the time of tender of delivery of the television,[105] so the consumer will be required to prove that the defect existed from the very beginning.

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more reliable products. . . . Only when the rules of the warranty game are clarified so that the consumer can look to the warranty duration of a guaranteed product as an indicator of product reliability will consumers be able to differentiate between reliable and less reliable products with the result that economic rewards from increased sales and reduced service costs will accrue to the producer of the more reliable products.

S. REP. No. 876, 91st Cong., 2d Sess. 5 (1970).

99. Magnuson-Moss Warranty Act § 104(c), 15 U.S.C. § 2304(c) (Supp. V 1975).

100. *Id.* § 102(c), 15 U.S.C. § 2302(c).

101. *Id.* § 110(d), 15 U.S.C. § 2310(d).

102. *Id.* § 101(7), 15 U.S.C. § 2301(7).

103. *Id.* §§ 104(a)(2), 108, 15 U.S.C. §§ 2304(a)(2), 2308. These provisions preempt state law, so that an attempted disclaimer is invalid for purposes of both federal and state law. *Id.* § 108(c), 15 U.S.C. § 2308(c).

104. U.C.C. § 2-725(1).

105. *See id.* § 2-714(1); J. WHITE & R. SUMMERS, *supra* note 68, at 286.

Warrantors using a limited warranty cannot disclaim liability for implied warranty, but they may limit the duration of their liability to the duration of the written warranty when that period is reasonable and conscionable.[106] Such limitations must be clearly disclosed. Thus, manufacturers who give a one year limited warranty on televisions may limit their liability under the implied warranty of merchantability to one year. It is not clear, however, what the Act means in referring to the "duration" of the implied warranty. Since the implied warranty is only broken by defects that existed from the time of delivery of the product, duration cannot mean a period of absolute liability for any malfunction within the period.

Rather, the "duration" of the implied warranty must be in the nature of a private statute of limitations. There are two possible alternatives for interpreting the nature of the limitations period. It may be either a period of time within which the consumer must initiate legal action, or a period within which the consumer must discover and give notice of the breach of warranty. If the limitation on duration authorized by the Act is a limitation on the time within which legal action must be initiated, any limitation of less than one year should be viewed as unconscionable in light of the express U.C.C. provision forbidding agreements to periods of limitation of less than one year.[107] In addition, since the Act allows the warrantor to require the consumer to resort to an informal dispute settlement mechanism prior to bringing suit,[108] initiation of such procedures should toll the limitations period. If instead the limitation period is viewed as the time during which the consumer must give notice of the breach, there also are problems. The U.C.C. places a duty on the buyer to give notice to the seller within a reasonable time of any breach which the buyer "should have discovered."[109] A limitation period for giving notice that is less than is reasonable under the U.C.C. should be unreasonable under Magnuson-Moss as well. In the case of the product defect that is difficult to discover, the U.C.C. allows a reasonable time after the buyer "should have discovered any breach."[110] A flat limitations period running from the date of sale of the product could be viewed as unreasonable if the consumer did not have enough time to discover the breach.[111]

106. Magnuson-Moss Warranty Act § 108(b), 15 U.S.C. § 2308(b) (Supp. V 1975).

107. U.C.C. § 2-725(1).

108. Magnuson-Moss Warranty Act § 110(a)(3), 15 U.S.C. § 2310(a)(3) (Supp. V 1975).

109. U.C.C. § 2-607(3)(a).

110. *Id.* Notice must be given before the expiration of the statute of limitations, however. *Id.* § 2-725(1). The statute will run notwithstanding the buyer's lack of knowledge of the breach. *Id.* § 2-725(2).

111. The U.C.C. allows the parties to a contract to vary the effect of provisions of the Act by agreement. *Id.* § 1-102(3). Thus, a warranty probably could contain a term requiring that notice of defects, regardless of their discoverability, be given within a particular time. The period would have to be a reasonable one, however, *id.* and the difficulty of discovery would be a factor in determining reasonableness.

C. *Failure to Comply with the Act*

Consumers generally do not have private rights to enforce the obligations imposed by the Federal Trade Commission Act.[112] Magnuson-Moss changes this rule for warranty liability, giving consumers a cause of action for damages caused "by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter."[113] Consumers may also obtain other legal and equitable relief.

Initially, it should be noted that the provision does not confer a generalized right to sue for violations of the Federal Trade Commission Act. It only refers to violations of sections 101 through 112 of the Magnuson-Moss Warranty Act. Thus, it apparently grants no right to sue for damages caused by warranty practices that are violations of section 5 of the FTC Act,[114] which proscribes unfair and deceptive practices. Section 110(c)(1) of the Magnuson-Moss Act, however, confers upon the Attorney General and the FTC power "to restrain . . . any warrantor from making a deceptive warranty with respect to a consumer product."[115] Thus, literally read, section 110(d) does give the consumer the right to sue for deceptive warranty practices. In light of the history of consumers' inability to sue for redress of deceptive practices under section 5 of the FTC Act, and the seeming separation of functions between private[116] and public enforcement[117] remedies, however, a court might conclude that the obligations "under this chapter" referred to in section 110(d) mean obligations imposed by sections other than section 110. But given the other obligations of section 110, for which a strong case of consumer enforceability can be made,[118] it is far from clear that Congress meant to exclude the obligations imposed by section 110 from those which consumers can enforce.

Regardless of whether the consumer can sue for deceptive warranty practices, the plain language of the Act gives consumers a cause of action for breach of any of the specific obligations imposed in sections 101 to 109 of the Act. It is necessary to explore in detail the types of obligations that might give rise to consumer complaints to see the full extent of the remedy afforded.

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112. *E.g.*, Alfred Dunhill Ltd. v. Interstate Cigar Co., 499 F.2d 232 (2d Cir. 1974); Carlson v. Coca-Cola Co., 483 F.2d 279 (9th Cir. 1973).

113. Magnuson-Moss Warranty Act § 110(d), 15 U.S.C. § 2310(d) (Supp. V 1975). As enacted by Congress, the Act read "under this title." Pub. L. No. 93-637, § 110(d), 88 Stat. 2183 (1975). The sections contained in Title I of the Act and the relevant chapter of U.S.C. are the same.

114. 15 U.S.C. § 45 (Supp. V 1975).

115. *Id.* § 2310(c)(1). Section 110(c)(2) then defines deceptive warranty to include warranties made under circumstances such that they are false, fraudulent, or misleading. *Id.* § 2310(c)(2).

116. Magnuson-Moss Warranty Act § 110(d), 15 U.S.C. § 2310(d) (Supp. V. 1975).

117. *Id.* § 110(c), 15 U.S.C. § 2310(c).

118. *I.e.*, the provisions for informal dispute mechanisms. See note 134 *infra* and accompanying text.

1. *Violation of Rules on Disclaiming Implied Warranties and Limiting Damages*

In some cases, the Act contains a specific remedy for violation of its provisions. For example, the remedy provided for improperly attempting to disclaim liability for implied warranty is that the disclaimer is invalid.[119] Similarly, when the warrantor under a full warranty fails to make a *conspicuous* limitation of consequential damages, the limitation is ineffective.[120] The Act does not specify whether these remedies are the exclusive remedies available for these violations. It is possible for an invalid clause to chill the assertion of rights when consumers are ignorant of the invalidity. If the chilling effect leads consumers to delay in pressing warranty claims until after the limitation period has run, the use of the invalid clause has caused injury. Proof of such an effect will be difficult, but it should not be foreclosed entirely.

2. *Violation of a Full Warrantor's Remedy Duties*

Magnuson-Moss contains requirements defining the remedy obligations of a warrantor under a full warranty.[121] Although the Act does not provide a specific remedy for violation of these requirements, the general remedy section should apply, and breach of these obligations should give rise to an action for damages or, in appropriate cases, for injunctive relief. Such actions are contemplated by the full warranty provisions themselves, which make the warrantor liable for incidental damages incurred by the consumer as the result of the warrantor's failure to remedy the product within a reasonable time or the imposition of an unreasonable condition on securing a remedy.[122]

3. *Failure to Designate Written Warranties as Full or Limited*

The Act imposes an obligation upon warrantors to designate warranties as either "full" or "limited."[123] Failure to designate is a major violation, because it impairs the Act's scheme of creating consumer awareness of the extent of warranty coverage and utilizing market pressures to achieve improvement in the warranties offered. Yet it is not clear whether consumers have an action against warrantors for failure to designate. Even if consumers have an action the nature of the relief they might obtain is uncertain. Failure to designate may make the written warranty misleading.

119. Magnuson-Moss Warranty Act § 108(c), 15 U.S.C. § 2308(c) (Supp. V 1975).

120. *Id.* § 104(a)(3), 15 U.S.C. § 2304(a)(3).

121. The remedy must be provided without charge and accomplished within a reasonable time, it cannot be made subject to unreasonable conditions, and if repair is unsuccessful, the consumer must be allowed to choose between refund and replacement. *Id.* § 104, 15 U.S.C. § 2304.

122. *Id.* § 104(d), 15 U.S.C. § 2304(d).

123. *Id.* § 103, 15 U.S.C. § 2303.

A remedy for his misleading conduct might be to hold the warrantor to the minimum standards for full warranties or, alternatively, to allow the consumer the right to rescind the transaction because of the deception. The consumer might also seek injunctive relief.

4. Violation of the Antitying Provision

The Act generally prohibits a warrantor from tying warranty coverage to the use of specified brand name service or parts unless the service or parts are provided free to the consumer.[124] Including provisions in the warranty contrary to this policy or failing to honor warranty obligations when other labor or parts have been used violates this part of the Act. Consumers should be able to obtain damages or injunctive relief for such violations. They also should be excused from resorting to the warrantor's prescribed remedy procedures before bringing suit for damages for breach of warranty, because the illegal tie may act as a deterrent to the assertion of warranty rights.

5. Violation of FTC Rules; Disclosure of Warranty Terms and Conditions

The FTC has adopted a variety of rules to implement the Act. For example, FTC rules govern disclosure by warrantors[125] and impose presale information responsibilities on sellers.[126] Whether a violation of these rules gives rise to a private action is unclear. Section 110(d)(1) creates an action for violations of "any obligation under this chapter." This language is narrower than that used with respect to the public enforcement rights given the Attorney General and the FTC to restrain persons from "failing to comply with any requirement imposed on such person by or *pursuant to* this chapter . . . ."[127] It also is narrower than the language that makes failure to comply with "any requirement imposed on [a] person by this chapter (or a rule thereunder)" a violation of section 5(a)(1) of the FTC Act.[128] This difference in language seems to suggest that consumers may not sue to enforce FTC rules.

An examination of the Act's requirement of disclosure of warranty terms and conditions suggests, however, that private suits based on certain FTC rules should be permitted. The Act provides that all warranties "shall, to the extent required by rules of the Commission, fully and conspicuously disclose . . . [their] terms and conditions."[129] This is one of the key provisions of the Act, since its purpose is to prevent deception of consum-

124. *Id.* § 102(c), 15 U.S.C. § 2302(c). See note 13 *supra*.

125. 16 C.F.R. Part 701 (1977).

126. *Id.* Part 702.

127. Magnuson-Moss Warranty Act § 110(c)(1), 15 U.S.C. § 2310(c)(1) (Supp. V 1975) (emphasis added).

128. *Id.* § 110(b), 15 U.S.C. § 2310(b).

129. *Id.* § 102(a), 15 U.S.C. § 2302(a).

ers. Therefore, failure to observe FTC rules on disclosure should lead to a private action.

There is no provision in the Act specifying the seller's obligation in the case of the presale availability of warranty rules, however.[130] No obligation exists in fact until the Commission's rules become effective. Thus, the argument in favor of private actions to enforce these rules is much weaker.

6. *Violation of Informal Dispute Settlement Procedures*

The Act gives warrantors the option of creating an informal dispute settlement mechanism which, if utilized, normally creates an exhaustion of remedies requirement for filing a civil action.[131] The "minimum requirements" that the procedure must satisfy are generally left to the Commission.[132] It is not clear whether a consumer can sue for violation of these FTC rules. The Act does state that the Commission, on complaint of interested persons, must review the operation of any settlement procedure and "take appropriate remedial action,"[133] suggesting that the FTC is the exclusive body concerned with the fairness of the procedures. Such an interpretation would, however, conflict with the legislative history of the Act indicating that consumers can test the dispute mechanism procedures in court.[134]

III
RELIEF

The Magnuson-Moss Act provides that consumers injured by any breach of warranty or by certain statutory violations "may bring suit for damages and other legal and equitable relief . . . ."[135] Successful litigants can recover costs, expenses, and attorneys' fees (based on actual time expended) that have been reasonably incurred. The court may, however,

130. *See id.* § 102(b), 15 U.S.C. § 2302(b).

131. *Id.* § 110(a), 15 U.S.C. § 2310(a).

132. *Id.* § 110(a)(2), 15 U.S.C. § 2310(a)(2). The FTC rules are contained in 16 C.F.R. Part 703 (1977).

133. Magnuson-Moss Warranty Act § 110(a)(4), 15 U.S.C. § 2310(a)(4) (Supp. V 1975).

134. Senator Moss, cosponsor of the legislation, stated on the floor of the Senate:

> [T]he consumer would be required to utilize any informal dispute settlement resolution mechanism which had been set up in compliance with rules of the Federal Trade Commission. These rules must require that any such mechanism created is fair and effective so that it does not just represent another hurdle that the consumer is forced to surmount before being afforded a meaningful avenue of redress. For instance, any mechanism must be independent and must have consumer of [sic] Government participation, and it must not only look good on paper, but function effectively and fairly in practice. In order to assure that they do, both the FTC and the courts may review their performance at any time on the motion of a consumer. The FTC may also do so on its own motion. Court review would occur when a consumer either uses a procedure and feels it to be unfair, or when he goes directly to court under section 110 and alleges unfairness. If the court finds that the procedures do not comply, then no use of them would be required.

120 CONG. REC. S.21,977 (daily ed. 1974).

135. Magnuson-Moss Warranty Act § 110(d)(1), 15 U.S.C. § 2310(d)(1) (Supp. V 1975).

deny an award of attorneys' fees if it determines that the award would be inappropriate.[136] These provisions for expenses, including attorneys' fees, may make Magnuson-Moss actions more attractive than the parallel actions available under state law. Plaintiffs pressing state law warranty claims will therefore probably add a count alleging a violation of Magnuson-Moss in order to establish a right to attorneys' fees. Beyond the provision for attorneys' fees, however, there are additional differences between remedies available under state law and those afforded by Magnuson-Moss.

A. Damages

Under the U.C.C., the basic measure of damages for breach of warranty entitles the buyer to the "difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."[137] "Incidental" and "consequential" damages may be recovered "in a proper case."[138] The Magnuson-Moss Act does not have an express formula for damages, but there is no reason why a measure different from that of the U.C.C. would be appropriate. In fact, the Act explicitly respects the limits state law places on recovery of consequential damages.[139]

Incidental expenses in obtaining repair present a nagging problem in connection with consumer products. A common example is shipping charges incurred in returning defective products to the manufacturer for warranty service. Must the consumer buyer of a piano, for example, bear the risk and expense of shipping the piano to the manufacturer for repair? Nothing in Magnuson-Moss obliges the warrantor under a limited warranty to cover such expenses in the limited warranty, but the manufacturer who gives a full warranty might be obligated to pay these charges. The federal minimum standards require the warrantor to remedy the problem "without charge."[140] But they "do not necessarily require the warrantor to compensate the consumer for incidental expenses,"[141] as long as the warrantor has acted reasonably. This language suggests that in most cases the supplier need not pay shipping costs. On the other hand, the warrantor cannot

136. *Id.* § 110(d)(2), 15 U.S.C. § 2310(d)(2).

137. U.C.C. § 2-714(2).

138. *Id.* § 2-714(3). Incidental damages are those resulting from the buyer's expenses in inspecting, receiving, transporting or caring for goods rightfully rejected because of breach of warranty, expenses incurred in obtaining insurance, "and any other reasonable expense incident to the delay or other breach." U.C.C. § 2-715(1). Consequential damages are defined broadly to include not only "injury to person or property proximately resulting from any breach of warranty" but also "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise." U.C.C. § 2-715(2).

139. Magnuson-Moss Warranty Act § 111(b)(2), 15 U.S.C. § 2311(b)(2) (Supp. V 1975).

140. *Id.* § 104(a)(1), 15 U.S.C. § 2304(a)(1).

141. *Id.* § 104(d), 15 U.S.C. § 2304(d).

"impose any duty other than notification upon any consumer as a condition of securing remedy" under a full warranty unless the warrantor can demonstrate the reasonableness of the duty.[142] Requiring consumers to arrange and pay for the transportation of a bulky, heavy piano surely is unreasonable. The time and expense involved in making satisfactory transportation arrangements would be a substantial deterrent to the exercise of warranty rights.[143]

In the case of products that are fixtures or are affixed to other goods, there will be burdens of removal and reinstallation in obtaining remedy of product defects. Must the consumer bear these expenses? If the product is covered by a full warranty the analysis is similar to that above for shipping expenses. The duty to provide a remedy without charge should impose a burden on the warrantor to affirmatively demonstrate the reasonableness of any charge for installation. When the product is sold uninstalled, as in the case of do-it-yourself panelling or floor coverings, it may at first seem fair to limit the warrantor to mere replacement of the product without liability for removal and reinstallation. It is the defect in the product that has caused the need for removal and reinstallation, however. If the warrantor had wanted to escape responsibility, the warranty offered could have been a "limited" one in which only product replacement was promised.[144]

Although the focus of Magnuson-Moss is on the "lemon," the consumer product that fails to function properly, the Act also has implica-

142. *Id.* § 104(b)(1), 15 U.S.C. § 2304(b)(1).

143. The legislative history tends to support the view that the charges for shipping the piano should be borne by the warrantor under the full warranty. Senator Magnuson used the piano example to illustrate a common consumer misunderstanding of warranty coverage which the Act would correct. 119 CONG. REC. 29,480 (1973).

144. The remedy under a full warranty must be provided to the consumer without charge. If the warranted product is a consumer product which is functional only when attached to some other product, such as an accessory part for an automobile or storm windows for a dwelling, a full warranty must provide installation without charge regardless of whether or not the consumer originally paid for installation by the warrantor or his agent. However, this does not preclude the warrantor from imposing a duty to remove, return, or reinstall where such duty meets the test of reasonableness under section 104(b)(1).

FTC, Magnuson-Moss Warranty Act Proposed Implementation and Enforcement Policy, 40 Fed. Reg. 25,721, 25,722 (1975). *Accord*, 36 Fed. Reg. 36,112, 36,117 (1977) (to be codified in 16 C.F.R. § 700.9).

Similar problems surround the use of registration cards. There is no prohibition on using such cards in connection with limited warranties, but the FTC seems of the view that giving the appearance of a registration card requirement, when none in fact is enforced, is a deceptive practice. 16 C.F.R. § 701.4 (1977). When the product is covered by a full warranty, the question again is whether requiring submission of the card is a reasonable condition on obtaining a remedy. If the function of the card is simply to date the acquisition of the product, the requirement will be permitted. 42 Fed. Reg. 36,116 (1977) (to be codified in 16 C.F.R. § 700.7). If, however, the purpose is to assure acknowledgement of the written warranty terms and applicable disclaimers, and return of the card is a condition precedent to performance under the warranty, the purpose is not to safeguard consumers' warranty rights but to limit them and the requirement will be viewed as unreasonable. *Id.*

tions for personal injury cases. The Act states: "Nothing in this chapter (other than sections 2308 and 2304(a)(2) and (4) . . .) shall . . . affect the liability of, or impose liability on, any person for personal injury . . . ."[145] If the parenthetical phrase had been omitted, nothing in the Act would impose liability for personal injuries. But both of the sections excepted parenthetically, section 2308 (section 108 of the Act), which forbids disclaimers of implied warranties, and section 2304 (section 104 of the Act), which prohibits full warrantors from limiting the duration of implied warranty coverage, can affect liability for personal injuries by making a cause of action for breach of implied warranty available. Since the Act, in turn, allows a private action for breach of implied warranty, the Magnuson-Moss Act does permit, as a matter of federal law, the recovery of damages for personal injury.[146]

Under the U.C.C. the measure of damages, including recovery of incidental expenses and consequential damages, may be altered by agreement.[147] The statutory language expressly approves "limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts."[148] There are two exceptions to this general principle of freedom of contract. When the agreed remedy fails of its "essential purpose," the parties are remitted to the U.C.C. provisions.[149] When the damages involve personal injuries from consumer goods, any limitation is "prima facie unconscionable."[150]

Magnuson-Moss also recognizes the freedom of contract principle by allowing warrantors to limit liability for consequential damages.[151] Under the U.C.C., arguing by analogy to section 2-316, which requires disclaimers of the implied warranty of merchantability to be conspicuous, buyers have urged courts to impose a "conspicuousness" requirement as a condition to limitations on consequential damages. A few courts have accepted the invitation.[152] The Magnuson-Moss minimum federal standards make the requirement explicit at least for "full" warranties.[153] Since no provision governs disclaimers of consequential damages for limited warranties, it can

145. Magnuson-Moss Warranty Act § 111(b)(2), 15 U.S.C. § 2311(b)(2) (Supp. V 1975).

146. Section 104(a)(3), 15 U.S.C. § 2304(a)(3) (Supp. V 1975), which concerns the limitation of consequential damages, was not included in the parenthetical exceptions. Section 111(b)(2)(B), 15 U.S.C. § 2311(b)(2)(B) (Supp. V 1975), however, provides that section 104(a)(3) does not override the state law provisions that make limitations on liability prima facie unconscionable when personal injuries from consumer goods are involved, *see* U.C.C. § 2-719(3).

147. U.C.C. § 2-719.

148. *Id.* § 2-719(1)(a).

149. *Id.* § 2-719(2).

150. *Id.* § 2-719(3).

151. Magnuson-Moss Warranty Act § 104(a)(3), 15 U.S.C. § 2304(a)(3) (Supp. V 1975).

152. *See* Avenell v. Westinghouse Elec. Corp., 41 Ohio App. 2d 150, 324 N.E.2d 583 (1974).

153. Magnuson-Moss Warranty Act § 104(a)(3), 15 U.S.C. § 2304(a)(3) (Supp. V 1975).

be argued that the "conspicuousness" requirement should be resolved according to state law principles when a limited warranty is involved. For full warranties, Magnuson-Moss supplements the U.C.C. principle that remedy limitation agreements become unenforceable when the "essential purpose" of the remedy fails by requiring the warrantor to "permit the consumer to elect either a refund for, or replacement without charge of" the product or part when "a reasonable number of attempts" to remedy the product fail.[154] There is no comparable provision for limited warranties, but similar results can be reached under state law by holding that the agreed remedy fails of its essential purpose when repeated repair efforts prove unavailing.[155]

B. Equitable Relief

The Magnuson-Moss Act allows consumers to obtain "equitable" relief,[156] but it provides no specific guidance as to the nature of such relief or when it might be available. There is reason to hope, however, that Magnuson-Moss will liberate consumer remedies from some of the confinement imposed by the U.C.C. The two major problem areas relate to the availability of rescission and specific performance.

The normal remedy for breach of warranty under the U.C.C. is damages. The right to rescind the transaction is qualified. To throw the goods back on the seller, the buyer must be entitled either to reject the goods, an action that must be taken before the goods are accepted, or to revoke acceptance.[157] To revoke, the buyer must give notice of the defect within a reasonable time after the defect is or should have been discovered, and "before any substantial change in condition of the goods which is not caused by their own defects." In addition, the acceptance of the goods must have been induced either by the difficulty of discovering the defect or the seller's promises to cure the defect.[158]

Some cases have held that a buyer cannot effectively revoke an acceptance of the goods unless they are tendered back to the seller.[159] In the case of

154. *Id.* § 104(a)(4), 15 U.S.C. § 2304(a)(4).

155. See text accompanying note 149 *supra*.

156. Magnuson-Moss Warranty Act § 110(d)(1), 15 U.S.C. § 2310(d)(1) (Supp. V 1975).

157. U.C.C. §§ 2-601, 2-602, 2-606, 2-607.

158. *Id.* § 2-608.

159. Under the U.C.C., the buyer who revokes acceptance may retain possession and has a security interest in the goods for any payments made, *id.* §§ 2-608(3), 2-711(3), but after revocation "any exercise of ownership by the buyer" is wrongful. *Id.* § 2-602(2)(a). These provisions have spawned a conflicting case law on whether a buyer may continue to use the goods after revocation. Cases holding that the buyer may not include Stroh v. American Recreation & Mobile Home Corp., 530 P.2d 989 (Colo. App. 1975); Waltz v. Chevrolet Motor Div., 307 A.2d 815 (Del. Super. 1973); Bowen v. Young, 507 S.W.2d 600 (Tex. App. 1974). Cases holding the buyer may continue to use the goods include Mobile Home Sales Management Inc. v. Brown, — Ariz. App. —, 562 P.2d 1378 (1977); Minsel v. El Rancho Mobile Home Center, Inc. 32 Mich. App. 10, 188 N.W.2d 9 (1971).

some consumer items, such as automobiles, mobile homes and other expensive products, this requirement places the buyer in an acute dilemma. If, for example, the car is needed for transportation purposes, the buyer cannot, as a practical matter, return it to the dealer unless substitute transportation is available. Problems such as this have led some courts to find an effective tender even though the buyer has continued to use the product after the purported revocation of acceptance.[160]

The phrase "equitable relief" in Magnuson-Moss may not be enough by itself to supplant traditional sales doctrine on the availability of rescissionary relief. Considering the Act as a whole, however, it does support affording consumers liberal use of rescission. First, unlike the U.C.C., the Act is little concerned with monetary damages. The remedial duties it expressly provides relate to the transaction—repair, replacement, or refund,[161] and refund is a rescissionary right. Second, it is consistent with the broad remedial purposes of the Act to construe it so as to liberate the consumer transaction from some of the formalities sales law establishes as preconditions to requiring sellers to take the goods back.

The U.C.C. rule on specific performance was intended "to further a more liberal attitude" on the availability of that remedy.[162] But even under its rule specific performance may not be available to many buyers of consumer goods. The U.C.C. permits specific performance "where the goods are unique or in other proper circumstances."[163] It is unlikely that many consumer goods will be unique; the consumer can easily purchase replacement goods in the open market, and the "other proper circumstances" exception may be construed narrowly.

It is, of course, as easy for the manufacturer of a mass-produced product to supply a replacement product as it is for the consumer to acquire one in the open market. Magnuson-Moss views the replacement remedy in this light. When a full warranty is given the warrantor has the duty, for purposes of both federal and state law, of repairing or replacing the product or refunding the consumer's money.[164] The importance the Act places on the replacement remedy, as in the case of the refund right, is demonstrated by the provision that requires the warrantor to make replacement or refund available when repeated repair efforts have been unsuccessful.[165]

C. Conditions to Private Actions

The Magnuson-Moss Act provides that no private action for breach of a written or implied warranty may be brought "unless the person obligated

160. See the second group of cases cited in note 159 *supra*.
161. Magnuson-Moss Warranty Act § 101(10), 15 U.S.C. § 2301(10) (Supp. V 1975).
162. U.C.C. § 2-716, Official Comment 1.
163. *Id.* § 2-716(1).
164. Magnuson-Moss Warranty Act § 101(10), 15 U.S.C. § 2301(10) (Supp. V 1975).
165. See text accompanying note 154 *supra*.

under the warranty . . . is afforded a reasonable opportunity to cure such failure to comply."[166] If the warrantor has adopted an informal dispute resolution procedure that meets FTC requirements, however, the consumer need not afford the warrantor an opportunity to cure the defect, but must resort to the dispute settlement procedure before instituting suit.[167] When the action is brought on behalf of a class, the duties are somewhat modified. A class suit may proceed "to the extent the court determines necessary to establish the representative capacity of the named plaintiffs," before the named plaintiffs need give the warrantor the opportunity to cure or resort to the dispute settlement procedure.[168]

1. Opportunity to Cure

The opportunity to cure required by Magnuson-Moss is not the same as the right to cure that has become a familiar part of Article 2 of the U.C.C. The U.C.C. grants the seller the right to cure only when the buyer has rejected the goods and it is still possible to make a conforming delivery within a "reasonable time."[169] No right to cure exists when the buyer justifiably revokes acceptance of the goods.[170] In consumer transactions, because of the probability the consumer has initially "accepted" the goods, the buyer's attempted turning back of the goods to the seller is more likely to constitute revocation of acceptance than rejection. Similarly, there is no cure right under the U.C.C. when the buyer does not reject the goods but elects to keep them and sue for damages. As a practical matter, however, it is difficult to envision a consumer buyer who would prefer a damage action to an otherwise satisfactory offer to cure.

To the extent the U.C.C. distinguishes for the purposes of the right to cure between the rejection of the goods, revocation of acceptance of the goods, and damages for breach of warranty, the Magnuson-Moss Act obliterates the distinction. The consumer plaintiff must afford the seller an opportunity to cure before initiating any action, unless it is an action expressly exempted by the Act because a dispute settlement procedure is available.

The procedural aspects of the U.C.C.'s right to cure should, however, provide guidance in implementing the Magnuson-Moss opportunity to cure.

166. Magnuson-Moss Warranty Act § 110(e), 15 U.S.C. § 2310(e) (Supp. V 1975).

167. *Id.* § 110(a)(3), (e), 15 U.S.C. § 2310(a)(3), (e).

168. *Id.*

169. U.C.C. § 2-508.

170. *Id.* § 2-608. There are two reasons supporting the U.C.C.'s grant of the right to cure when the goods are rejected but not when acceptance is revoked. One relates to the time of performance. Rejection is likely to occur early in the contract while there is still time for a substitute performance. The other relates to the difference in standards for rejection and revocation. A buyer may reject when the goods "fail in any respect to conform to the contract." *Id.* § 2-601. Revocation is possible only for the most serious problems and only when the buyer's failure to reject can be excused. *Id.* § 2-608(1), (2).

The U.C.C. does not require the buyer to demand that the seller cure.[171] Although the cautious buyer will make a formal demand, Magnuson-Moss should not be read to encumber the buyer's remedies with an obligation to do so, especially if there have been prior dealings between the parties which have failed to produce a remedy. Under the U.C.C. the buyer must give notice of the breach of warranty.[172] As long as sufficient regard is given to the informal nature of the notice and specification of defects which is likely from consumer buyers, there is sound reason for viewing this notice as satisfying the Magnuson-Moss "opportunity to cure" requirement. Nothing in Magnuson-Moss eliminates the seller's duty under the U.C.C. of notifying the buyer of his intention to cure.[173]

If a warranty is cautiously drafted, the cure it specifies will ordinarily be repair of the product. When repeated but unsuccessful efforts to repair have been made, further repair will not be an attractive alternative to the consumer. The Act expressly provides with respect to full warranties that the consumer must be allowed to elect either refund or replacement in such cases.[174] There is no comparable provision for limited warranties, but a similar result might be reached under state law by concluding that the repair remedy failed of its essential purpose.[175]

When a consumer purchases a new product which immediately malfunctions, the consumer may resist the warrantor's offers to repair and insist that the defective product be replaced. The consumer's argument is that the contract was for the purchase of a properly functioning new automobile, for example, not a repaired automobile. It is not clear whether Magnuson-Moss requires the consumer to accept repair rather than replacement, since the Act is silent as to what constitutes an effective cure.[176] Under the U.C.C., to cure a breach of contract the seller must make a "conforming delivery."[177] The product must conform to the description of the goods and the standard of quality contained in the contract. Unless the parties have agreed otherwise, if the repaired automobile would not pass in the market as a substitute for the new automobile called for in the contract, the seller has not made a conforming delivery.[178] The U.C.C. analogy should be followed in interpreting the Magnuson-Moss right to cure. Nothing less than a "conforming delivery" should be acceptable under Magnuson-Moss.

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171. *Id.* § 2-508(1).

172. *Id.* §§ 2-605(1), 2-607(3)(a).

173. *Id.* § 2-508.

174. Magnuson-Moss Warranty Act § 104(a)(4), 15 U.S.C. § 2304(a)(4) (Supp. V 1975).

175. U.C.C. § 2-719(2).

176. *See* Magnuson-Moss Warranty Act §§ 101(10), 104(a), 15 U.S.C. §§ 2301(10), 2304(a) (Supp. V 1975).

177. U.C.C. § 2-508. The parties could, of course, agree that the buyer would not have the right to reject the automobile but would be left to other remedies. *Id.* § 2-719.

178. *Compare* Wilson v. Scampoli, 228 A.2d 848 (D.C. 1967), *with* Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (1968).

Once the time specified in the contract for delivery of the product has elapsed it is impossible to make a "conforming delivery." Therefore the seller cannot cure unless "the seller had reasonable grounds to believe [the original tender of delivery] would be acceptable with or without money allowance."[179] If a buyer orders a new car for delivery on January first to take a trip which must begin that day and the seller knows of the buyer's requirements, this provision of the U.C.C. will not let the seller cure a defective tender on the first by tendering a perfect car on the fifth. The buyer is entitled to the bargained-for time of performance. It may be that for many consumer contracts the time of performance is not critical. For these sales, Magnuson-Moss poses no conflict with the U.C.C. Where the performance time is essential, the Magnuson-Moss "opportunity to cure" should be interpreted in light of the U.C.C. If the buyer were required to give the seller additional time to make a satisfactory tender, the buyer would lose the benefit of the bargain. How then can the buyer comply with the Act's dictate that the seller be given an "opportunity to cure"? It is possible that a "money allowance" might reimburse the buyer for the delay. Perhaps the buyer should give the seller a chance to propose such an adjustment. The buyer should not be required, however, to accept a late performance for which no reasonable adjustment is offered.

2. *Exhaustion of Informal Dispute Settlement Procedures*

An important objective of the Magnuson-Moss Act is the establishment of an efficient, low-cost method for resolving consumer disputes. To accomplish this goal, the Act gives warrantors the option of establishing an informal dispute settlement mechanism. It also supplies an incentive for establishing such a procedure. A warrantor who has a qualified mechanism may require in the written warranty that the dispute settlement procedures be exhausted before consumer litigation under the private action sections of the Act is initiated.[180]

The operation of the settlement mechanism is prescribed by FTC rules. After a dispute is presented to it, the mechanism must investigate the dispute and, in most cases, render a decision within forty days.[181] The decision must

179. U.C.C. § 2-508.

180. Magnuson-Moss Warranty Act § 110(a)(3), 15 U.S.C. § 2310(a)(3) (Supp. V 1975). The exhaustion requirement will not apply, as such, if the consumer chooses to forego the Magnuson-Moss remedies and sue under state law, for the requirement applies only to actions brought "under subsection d" of § 110 of the Act. 15 U.S.C. § 2310(a)(3) (Supp. V 1975). Of course, the exhaustion requirement still might be a valid term of an express warranty or a valid modification of an implied warranty. Since § 2-316 of the U.C.C. allows a party to disclaim implied warranty liability completely, it surely cannot violate its policy to give effect to a term requiring exhaustion of a nonbinding dispute settlement procedure. The enforceability of the exhaustion term under state law is probably unimportant, however, since most consumer litigation will be based on the Act in order to recover attorney's fees. Unless attorneys' fees can be recovered, much consumer litigation will not be feasible.

181. 16 C.F.R. § 703.5 (1977).

include proposed remedies, which may include the payment of damages.[182] The decision is not binding upon either party to the dispute, but the warrantor must exercise good faith in determining whether to abide by a decision.[183] By the terms of the Act, any decision "shall be admissible in evidence" in any warranty litigation that relates to a matter considered in the dispute settlement procedure.[184]

Members of the decisionmaking panel must be insulated from the warrantor's influence.[185] They cannot be employees of a party to the dispute "other than for the purposes of deciding disputes."[186] Members representing governmental or independent agencies such as consumer groups must participate in the process.[187] The warrantor is obligated to provide adequate funding and staffing, and no charge for use of the mechanism may be assessed against consumers.[188] The mechanism must satisfy FTC record-keeping requirements, including an annual independent audit.[189] Procedures are informal. No oral presentation can be made unless both the warrantor and the consumer expressly agree.[190]

When a class action is brought, the suit may proceed to a determination of the representative capacity of the named plaintiffs, but cannot proceed further until after the named plaintiffs resort to the mechanism.[191] The mechanism apparently is to propose a decision for the resolution of the entire class dispute.[192] Problems can be expected to arise in such situations, as the settlement mechanisms may not be well equipped to handle the difficulties involved in proving damages for large numbers of class members.

The major factor in the warrantor's decision whether to create a mechanism for dispute resolution will be the warrantor's estimate of potential liability with the mechanism as compared to the liability without it. This estimate will necessarily involve a guess as to the size of the awards the mechanism will render, and the number of claims that would not otherwise have been made that will be submitted to the mechanism. Although it is impossible to forecast the size of mechanism damage awards, there are some reasons for supposing that the informal procedure will be cheaper than going to court. The warranty dispute expertise of the mechanism panels may assist

182. *Id.*
183. *Id.* §§ 703.2(g), 703.5(j).
184. Magnuson-Moss Warranty Act § 110(a)(3), 15 U.S.C. § 2310(a)(3) (Supp. V 1975).
185. 16 C.F.R. § 703.3(b) (1977).
186. *Id.* § 703.4.
187. Magnuson-Moss Warranty Act § 110(a)(2), 15 U.S.C. § 2310(a)(2) (Supp. V 1975).
188. 16 C.F.R. § 703.3(a) (1977).
189. *Id.* § 703.6.
190. *Id.* § 703.5.
191. Magnuson-Moss Warranty Act § 110(a)(3), 15 U.S.C. § 2310(a)(3) (Supp. V 1975).
192. Otherwise, there is no reason to allow the class action to first proceed to a determination of the representative capacity of the named plaintiffs, or to require the plaintiffs to give notice that they are involved in a class action.

them in reducing inflated claims. In addition, the availability of an early, expeditious dispute procedure may facilitate compromises between the disputants. Finally, the informality of the procedures will save warrantors the cost of litigation, including potential liability for plaintiffs' expenses and attorneys' fees.

The assessment of the desirability of establishing a mechanism will also be influenced by the effect that the mechanism decisions will have upon subsequent litigation. Will the award tend to place a ceiling on subsequent recoveries, and so reduce the level of awards, or will the decision only serve as a floor from which additional damages can be claimed? If the warrantor could be assured that the decision of the mechanism would carry substantial weight, the mechanism might seem more desirable. Unfortunately, the Act speaks uncertainly of the effect to be given mechanism decisions. The Act states that the decision reached by the mechanism is "admissible," but fails to specify the weight it should be accorded.[193] Mechanism decisions should be given substantial weight in order to encourage the creation of alternative remedies that are more economical and expeditious than litigation. For the same reasons, a court would be justified, in passing on the reasonableness of attorney fees awards, to consider whether the award of the mechanism would have given the consumer adequate relief.[194]

CONCLUSION

The Magnuson-Moss Warranty Act adds a new layer of federal warranty law to existing state warranty doctrines. In a few instances, as in the case of implied warranty disclaimers, the federal act supplants state law. For the most part, however, the federal and state doctrines coexist.

Although the Act parallels the U.C.C., the two are not coextensive. Under the U.C.C., a wide range of representations can qualify as express warranties, but under Magnuson-Moss the representations must meet additional requirements: they must promise the product is "defect free" or that the product will give a "specified level of performance for a specified period of time."

The complexity of the federal act is increased by the interplay between the state and federal systems. Occasionally the federal act makes clear its reliance on state law, as in the recognition of implied warranties under state law. More often, as in the treatment of the privity issues and the relief available to consumers, the Act is silent on the extent to which deference to state law is appropriate.

The ultimate question, of course, is whether the private remedy that Magnuson-Moss gives consumers will be the effective remedy the architects

193. *See* Smith v. Universal Services, 454 F.2d 154 (5th Cir. 1972).

194. The court has discretion to decide an award of attorney fees would be "inappropriate." Magnuson-Moss Warranty Act § 110(d)(2), 15 U.S.C. § 2310(d)(2) (Supp. V 1975).

of the legislation intended. From a consumer standpoint, the Act is an advance over the U.C.C. in two major respects. It authorizes awards of attorneys' fees and prohibits implied warranty disclaimers. The prospect of recovering attorney fees will be an inducement for bringing actions that otherwise would not be economically feasible. The prohibition against disclaimers will assure buyers of warranted consumer products that the products meet basic standards of merchantability and fitness for ordinary use. Other provisions of the Act, such as those dealing with privity and those relating to the type of relief which is available, may assist consumers if the construction of the Act urged in this Article is followed.

Notwithstanding these advances, it is still possible to ask whether the aims of Magnuson-Moss were not purchased at too high a price in complexity. So far as the private right of action is concerned, most of the consumer benefits could have been obtained by a few straightforward provisions directed at modifying the rules imposed by the U.C.C. One provision would make disclaimers of implied warranties in consumer transactions illegal. The other would allow consumers attorneys' fees in warranty actions. If desired, a further provision abolishing the privity defense in consumer transactions could be adopted. Instead of being content with simple changes like these, which would have avoided the definitional and coverage issues of the present scheme, the Magnuson-Moss Act creates a new federal warranty system, which in part parallels state law and in part diverges from it. The complexity that results from this dual approach is not insurmountable, although the opaque drafting style of the Act makes interpretation difficult at times, but the question remains whether the confusion was necessary at all.