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Ronald Lipinski

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CONSUMER PRODUCT WARRANTIES— THE FTC STEPS IN

On January 4, 1975, President Ford signed into law the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act.¹ With this legislation, under the aegis of the Federal Trade Commission, the federal government entered into the world of consumer product warranty for the first time.

The Act was passed with the intent to require that all warranties given on consumer products be printed in conspicuous language, readily understandable to the “reasonable average consumer.”² It also seeks to define federal minimum content standards for consumer warranties and to provide mechanisms for easier disposition of consumer claims. These purposes were stated by one of the Act’s sponsors as responsive to the consumer need for understanding, minimum warranty protection, better warranty performance and greater product reliability.³

In order to accomplish these ends the Act establishes a comprehensive three-part scheme to attack the problems. The Act first requires that product information be disclosed to the consumer with the hope that this will allow intelligent purchasing decisions to be made. Second, the Act provides substantive regulation of the content of consumer product warranties once the decision to warrant has been made by the manufacturer. Finally, the Act provides for the creation of informal and formal procedures involving the FTC, consumers, sellers and the federal and state courts in the resolution of consumer problems and enforcement of warranty claims.

BACKGROUND

In the past 75 years, the commercial world has undergone radical changes. The Western world has become highly industrialized and able to produce vast quantities of consumer goods. The introduction of the assembly line and its adaptability to a continually growing assortment of processes allowed economies of scale to cut production costs for individual products. Thus, a lower cost per product made it possible for more consumers to purchase the growing assortment of consumer products being developed.

1. 15 U.S.C.A. §§ 2301 *et seq.* (1975) [hereinafter cited as the Act].

2. Preamble to the Act, 88 Stat. 2183, Pub. L. No. 93-637 (1975).

3. Magnuson, *Fair Disclosure in the Marketplace of Warranty Promises—Truth in Warranties for Consumers*, 8 U.C.C.L.J. 117 (1975) [hereinafter cited as Magnuson Article].

An impressive example of how the volume of goods produced has increased is that of the automobile industry. In 1896, thirteen cars of the same design were produced by one organized company. In 1971 there were over 8.5 million passenger cars produced in the United States.⁴ A further illustration is contained in the House Report on the Magnuson-Moss Act where a statistical compilation listing over fifty consumer appliances (exclusive of automobiles) showed that over 177 million of these products were produced in the United States in 1972.⁵

To sell and distribute this multitude of products corresponding complex distribution systems have been developed. These systems make it possible for a manufacturer to distribute a product throughout the entire country. The distribution chain is composed of various regional distributors who sell to wholesalers who in turn sell to the retail seller. It is not unusual for the buyer of a consumer product to be separated from the manufacturer by three or more other parties in the chain of distribution. Furthermore, the mass merchandising retailers of our time add to this consumer isolation by their very size.

Thus, while the mass production of consumer products has made large numbers of products available to many consumers at low cost, it has also created a highly impersonal market. No longer is a consumer able to bargain over the terms of a contract. The representative he deals with is a mere money taker with no power to alter any of the terms or conditions of the sale.

The consumer thus purchases most, if not all, of his products under contracts of adhesion. The consumer must either adhere to the terms set forth by the seller or not buy. This inability to bargain has resulted in consumers being unable to adequately protect themselves from defects in products with a satisfactory warranty to insure product reliability.

Consumer frustration and anger over warranties began to surface in the early 1960's. One of the first manifestations of this frustration by consumers was the Federal Trade Commission's *Guides Against Deceptive Advertising of Guarantees*.⁶ These *Guides* provided the standards for determining whether particular advertising of guarantees was deceptive. While the *Guides* were the basis for numerous informal actions⁷ and have been cited by the Commission several times,⁸ the need for revi-

4. H.R. REP. No. 1107, 93d Cong., 2d Sess. (1974), 4 U.S. CODE CONG. & ADMIN. NEWS 7702, 7717 (1975) [hereinafter cited as House Report, Admin. News].

5. *Id.*

6. 16 C.F.R. § 239 (adopted April 26, 1960) [hereinafter cited as *Guides*].

7. 40 Fed. Reg. 60169 (1975).

8. *Id.* at n.7.

sion became apparent. The proliferation of new products and expanded use of warranties as marketing devices showed the need to expand the *Guides* to encompass a wider range of warranty problems.⁹

In addition to the *Guides*, the FTC conducted two studies on automobile warranties during the 1960's.¹⁰ The first, a Staff Report issued on November 18, 1964, indicated that performance of manufacturers was less than satisfactory. The Report indicated that the manufacturers viewed warranties merely as selling devices and not as legal obligations to insure product reliability. Further the Report indicated that the warranties given did not provide adequate information to consumers and that manufacturers failed to make adequate arrangements for service of warranty claims. The second FTC report on automobile warranties affirmed the findings of the Staff Report and recommended that extensive federal legislation be passed to establish governmental machinery to assure quality control and minimum performance in the automobile industry.

Another report on warranties during the 1960's was by a special Task Force on Appliance Warranties established in 1968 by President Johnson.¹¹ This report indicated that warranty performance by manufacturers was far from satisfactory and listed five pages of proposed solutions.¹² These proposed solutions can be summarized as having three basic themes: a) education and disclosure of information; b) regulation of warranties by the federal government; and c) establishment of procedures for easier consumer enforcement of warranties. The report concluded: "At the end of one year, if it appears that substantial progress is not being made toward the solution of these problems, the mentioned officials should consider the nature and scope of legislation necessary to achieve the desired results."¹³

Additional studies of warranties were conducted by both government and private groups.¹⁴ While these reports differed

9. However, in the Implementation and Enforcement Policy for the Act, 40 Fed. Reg. 25721, 25724 (1975) [hereinafter cited as Enforcement Policy], the FTC indicated that the *Guides* would remain effective until repealed or superseded by new rules.

10. FTC, STAFF REPORT ON AUTOMOBILE WARRANTIES (November 18, 1968); FTC, REPORT ON AUTOMOBILE WARRANTIES (February 19, 1970).

11. TASK FORCE ON APPLIANCE WARRANTIES AND SERVICE, THE PRESIDENT'S TASK FORCE REPORT ON APPLIANCE WARRANTIES AND SERVICES (1969).

12. *Id.* at 109-14.

13. *Id.* at 114.

14. See Major Appliance Consumer Action Panel, MACAP ANALYSIS OF MAJOR APPLIANCE WARRANTIES (1971, 1973); Sub-Council on Warranties and Guaranties of the National Business Counsel for Consumer Affairs, PRODUCT WARRANTIES: BUSINESS GUIDELINES TO MEET CONSUMER NEEDS (1972); Staff of House Interstate and Foreign Commerce Comm., Subcomm. on Commerce and Finance, REPORT ON CONSUMER PRODUCTS

as to their ultimate conclusions, all of them agreed that the warranties given on consumer products and the performance of the obligations created by the warranties were inadequate. These additional studies added to the evidence calling for the comprehensive legislation on consumer warranties present in the Magnuson-Moss Warranty Act.

The events and reports leading up to the Act may be summarized as follows.

1. The commercial organization of society has changed to produce an impersonal market between sellers and consumer buyers.

2. There has evolved a gross inequality in bargaining power between consumers and sellers which has resulted in consumers being unable to adequately bargain for warranty protection.

3. Sellers have generally regarded warranties as devices to increase sales and not as legal obligations.

4. Warranties did not provide sufficient information as to the duties undertaken or procedures to be followed to enforce warranties in order to allow consumers to make intelligent decisions at the time of purchase.

5. Warrantors did not adequately establish physical mechanisms or make adequate arrangements to fulfill the duties undertaken.

6. Most warranties unnecessarily disclaimed duties imposed by law. Warranties, while ostensibly granting rights to consumers, actually served to limit the liability of the seller. Thus in many situations a consumer was better protected when no warranty was given. Warranties deceived consumers, since the consumer's understanding of the warranty did not coincide with the legal meaning.

7. The market forces between competitors were not strong enough to compel the giving of meaningful warranties, and in some situations prevented it.

8. Consumers had no adequate means to enforce warranty obligations since court proceedings were both too costly and too time consuming.

9. The states had not acted effectively and were perhaps precluded from doing so. Because of the enormous number of products involved, the potential for inconsistent state regulation would have placed an extreme burden on interstate commerce.

Hence, on the basis of several reports, Congress decided to act. The first legislative proposals on warranty regulation were introduced in the Ninety-First Congress in 1969. After numerous

hearings and amendments the present Act emerged.¹⁵ Its provisions became effective on July 4, 1975. Mandatory rules promulgated under the Act were published on December 31, 1975, and become effective December 31, 1976.

SCOPE AND APPLICABILITY

Before examining particular substantive sections of the Act, consideration should be given to the potential reach of its provisions. The Act is applicable to written warranties pertaining to *all consumer products*. While two sections of major importance affect only products with a cost above a stated minimum,¹⁶ this legislation could potentially affect all personal property purchased by every consumer for his own use. It has the capability of affecting the rights of the buyer, seller and manufacturer in transactions involving candy bars costing ten cents or camper motor homes costing twenty thousand dollars.

Of course, it is probable that the Act will never approach this extreme breadth of coverage. There are limitations present in the definition and other minimum requirements, as well as practical considerations. However, it is important to emphasize that the Act does affect warranties given on literally millions of products of every size, shape and description.

There are two threshold requirements which must be met before any of the Act applies: 1) *a written warranty* must be given; 2) *on a consumer product*.

The definition of written warranty in the Act¹⁷ has been drafted in broad language in order to cover a vast number of circumstances. The section sets out two situations which give rise to a written warranty for purposes of the Act. The first situation in which a written warranty is created is where there are "written affirmations of fact" made in connection with the sale of a consumer product to a buyer not for resale. A warranty of this type is analogous to an express warranty under the UCC.¹⁸ This definition of written warranty is broad enough to include advertising or point of sale material describing the product.

WARRANTIES (1974). The above reports are discussed and cited by the FTC in 40 Fed. Reg. 60168-69. See also discussion in the House Report, Admin. News, note 4 *supra* at 7702-11.

15. Magnuson Article, note 3 *supra* at 118-20, contains a good summary of prior attempts at federal warranty legislation.

16. 15 U.S.C.A. § 2302 applied to products actually costing more than \$5.00. *Id.* § 2303 applied to products actually costing more than \$10.00. Both dollar limits have been raised to \$15.00 by the rules. See 40 Fed. Reg. 60171-72, 60188-89; 16 C.F.R. §§ 701.2, 702.3.

17. 15 U.S.C.A. § 2301(6) (1975).

18. UNIFORM COMMERCIAL CODE § 2-313 and Comments thereto [hereinafter cited as UCC].

The definition states that if such written affirmation of fact or promise becomes a "part of the basis of the bargain" a written warranty has been created. Since the "basis of the bargain" language is the same as that used in the UCC, it appears that intent to warrant is not necessary nor is reliance by the buyer on the words or affirmations required. In any event, sellers of consumer products should be aware of the fact that any written representations made in connection with the sale can be a warranty, and thus its language should be clear and understandable to an average person. Otherwise a seller could be subject to an action by the FTC for deceptive warranty practices under the terms of the Act.

The other manner by which a written warranty is created is where a supplier specifically undertakes a duty to refund, repair or replace a consumer product. This covers the usual circumstance in which a supplier has intentionally stated that it will take some affirmative remedial action if the product does not meet certain stated specifications. Here again the undertaking must become part of the basis of the bargain.

The other threshold requirement to be met for coverage is that the product be a "consumer product." The Act defines three requirements which must be met in order for a product to be a consumer product: 1) the product must be tangible personal property; 2) distributed in commerce; and 3) normally used for personal, family or household purposes.¹⁹

The first requirement limits the Act to material goods and excludes services. The definition, while aimed primarily at movables, does include installed building fixtures such as air conditioners or hot water heaters. The Act has wisely attempted to eliminate the problems which would have been caused if its application to certain types of personal property ceased upon permanent attachment to realty.

The requirement that the goods be "distributed in commerce" encompasses the entire scope of the commerce clause of the Constitution.²⁰ Thus, there are few products which are not in interstate commerce for purposes of the Act.

The requirement that the product be normally used for personal, family or household purposes is the most difficult to apply. The emphasis in the definition is not on how the product is actually used, but on how or in what manner the seller or person buying it would normally expect the product to be utilized. The key word is *normally*. There is no problem in determining whether some products used by both consumers and

19. 15 U.S.C.A. § 2301 (1).

20. U.S. CONST. art. I, § 8.

businesses are covered or excluded. For example, automobiles used by a business are covered since most cars are bought and used by consumers. Truck tractors are excluded since these are very rarely purchased by consumers for personal use.

An ambiguity does arise, however, where it is unclear just what percentage of a product sold is purchased by consumers. A line of power hand tools sold to both businesses and consumers could fall into this situation. The Enforcement Policy²¹ states that a product is a consumer product "where an appreciable portion of a product category is normally sold to consumers."²² Moreover, Senator Magnuson has stated that any such ambiguity should be resolved in favor of coverage.²³ The FTC has provided some relief to a manufacturer faced with a coverage dilemma in its rules on disclosure²⁴ and presale availability.²⁵ Although the rules indicate that the FTC is aware of this problem, in determining coverage for certain products it failed to provide a solution or meaningful clarification for a manufacturer faced with it. The rules only exempt the seller from the obligations defined therein and leave the seller otherwise subject to the other duties imposed by the Act.

In any event, the question of whether a product is "normally used" for personal use will necessitate some difficult decisions for manufacturers of products in the fringe area. Manufacturers unwilling to assume the obligations of the Act toward such products must beware, however, since the FTC will lean toward coverage.

Other definitions worthy of note are those for consumer,²⁶ supplier²⁷ and warrantor.²⁸ The definition of consumer encompasses not only the buyer of a product for personal use, but also includes transferees from that person. Where a seller gives a warranty for a fixed time period, the warranty is effective and runs to all transferees from a consumer during that time period.²⁹ Thus, a warranty should enhance the value of a consumer product and become a true measure of product performance and reliability.

The Act's definition of supplier is important because of its far reaching coverage and its connection with the Act's definition of warrantor.³⁰ A supplier is any person in the business of mak-

21. Enforcement Policy, note 9 *supra* at 25721.

22. *Id.* at 25722.

23. Magnuson Article, note 3 *supra* at 137.

24. 16 C.F.R. § 701, 40 Fed. Reg. 60188.

25. *Id.* § 702, 40 Fed. Reg. 60189.

26. 15 U.S.C.A. § 2301(3).

27. *Id.* § 2301(4).

28. *Id.* § 2301(5).

29. House Report, Admin. News, note 4 *supra* at 7717.

30. See text accompanying notes 34-36 *infra*.

ing a consumer product available to consumers. There are two important aspects of this definition.

First, a supplier must be in business. Thus, a consumer who engages in a casual resale of a consumer product is not a supplier.³¹ This is somewhat analogous to the concept of merchant under the UCC.³² Second, a seller is a supplier by directly or indirectly making a consumer product available. In this way the Act expressly does away with the concept of contract privity. All members of the distributive chain are suppliers, since they make consumer products available to consumers.³³

The definition of warrantor in the Act states that: "[W]arrantor' means any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty."³⁴ A careful reading of this definition in connection with the definition of supplier, shows that everyone in the chain of distribution, manufacturers, distributors, retailers and even component makers, are warrantors under the Act.³⁵ The words "or other person" include the rest of the world as potential warrantors. The definition is broad enough to reach anyone having any connection with a consumer product on which a written warranty is given. Of course, the extent to which these "other persons" are actually covered by the definitions, and the effect such coverage will have, depends on the relationship they have with the written warranty.³⁶

The scope of the Act, therefore, is broad enough to embrace all written warranties given on all products sold in any appreciable quantities to consumers. The effects of the Act are far-reaching enough to be felt by anyone having any contact with the production or sale of such a product.

MAJOR PROVISIONS

There are four major areas of importance contained in the Act. These are: 1) Disclosure and Content Standards;³⁷ 2) Designation³⁸ and Federal Minimum Standards for Warranties;³⁹ 3) Restrictions on Disclaimer of Implied Warranties;⁴⁰ and 4) Enforcement and Remedies.⁴¹ These four important

31. House Report, Admin. News, note 4 *supra* at 7717.
 32. See UCC §§ 2-104, 2-201 (2), 2-205, 2-207 (2), 2-209 (2), 2-314.
 33. Magnuson Article, note 3 *supra* at 139.
 34. 15 U.S.C.A. § 2301 (5).
 35. Magnuson Article, note 3 *supra* at 139.
 36. See 15 U.S.C.A. § 2310 (f) and House Report, Admin. News, note 4 *supra* at 7759.
 37. 15 U.S.C.A. § 2302.
 38. *Id.* § 2303.
 39. *Id.* § 2304.
 40. *Id.* § 2308.
 41. *Id.* § 2310.

provisions are the core of the Act and make substantive changes in warranties given on consumer products.

Disclosure and Content Standards

Section 102(a) on warranty disclosure and content sets out thirteen specific items which the FTC, by rule, could have required as inclusions in written warranties.⁴² (This list was suggestive and not by any means exclusive.) All of the items set out were in line with the Act's avowed purpose of making warranties fully and conspicuously disclosed in language readily understandable by the reasonable average consumer. This section, concerned with the structure and form of warranties, requires that the consumer receive full information as to the scope and enforceability of the warranty.

The section provided that it was applicable to warranties given on consumer products which cost more than \$5.00.⁴³ However, the rules promulgated by the FTC have raised the cost requirement to actually costing more than \$15.00,⁴⁴ and have provided an exception for products bought solely for use in a business.⁴⁵

The final rule under this section sets out in detail the exact items of information which must be contained in consumer product warranties. This information includes names and addresses of the warrantor, parts covered or excluded, duties of the buyer and the procedure which should be followed to enforce rights created by the warranty.

The rules require the inclusion of language indicating that a disclaimer in the warranty may not be enforceable in the various states. All of the warranty information must be assembled in a single document. The rules also require that warrantors who use owner registration cards with the product clarify the purposes for the use of such cards. It should be emphasized that these rules do *not* establish any new duties for warrantors toward their products or grant any new remedies to consumers. The FTC has not been given the authority to require that a product be warranted.⁴⁶ A producer still has the right to decide whether a written warranty will be given, its duration and the remedy provided.⁴⁷ However, once a manufacturer has deter-

42. It was mandatory that the FTC promulgate a rule within one year from January 4, 1975, on this issue. The rule is 16 C.F.R. §§ 701-02, 40 Fed. Reg. 60188-89 (1975).

43. 15 U.S.C.A. § 2302(e).

44. 16 C.F.R. §§ 701.2, 702.3, 40 Fed. Reg. 60188-89. *See also* 40 Fed. Reg. 60171.

45. 16 C.F.R. §§ 701.1(b), (h); 702.1(b).

46. 15 U.S.C.A. § 2302(b)(2).

47. *See* definitions of "remedy," *id.* § 2301(10); "replacement," *id.* § 2301(11); and "refund," *id.* § 2301(12).

mined that a written warranty will be made, the warranty becomes subject to the requirements of the Act.

Section 102(b)⁴⁸ of the Act sets out another area for mandatory rule-making by the FTC—presale availability of warranties. This requirement that the warranty be available for inspection prior to sale is a common sense partner of the disclosure rule. It would be senseless to provide information designed to promote intelligent buying decisions if the consumer did not have access to it prior to making the decision to buy.

The rule⁴⁹ places an affirmative duty on both the seller and warrantor to make the information available to the consumer. The FTC has provided several options which can be used. These include maintaining a binder containing the warranty, printing the warranty on the outside of the package or displaying the text of the warranty in close proximity to the product.

Also included under section 102 are various other provisions of importance to consumers. These provisions provide that: 1) the FTC may prescribe rules on the manner and form in which information about a consumer product warranty contained in "advertising, labeling, point of sale material or other representations in writing" is presented or displayed so as not to mislead the reasonable average consumer;⁵⁰ 2) the FTC may by rule provide that a warranty period be extended when a consumer is deprived of the use of a product for an unreasonable time due to a breach of the warranty;⁵¹ 3) a seller cannot condition the warranty upon the use of another product designated by brand name in connection with the warranted product unless the seller can prove that the warranted product cannot function properly without the named product;⁵² and 4) the FTC may by rule detail substantive warranties which warrantors may incorporate by reference.⁵³

Designation and Minimum Standards

The sections entitled Designation of Warranties⁵⁴ and Federal Minimum Standards for Warranty⁵⁵ must be considered together. Under Designation of Warranties, the Act provides that any product actually costing more than \$10 be conspicuously designated as either a "full (statement of duration)

48. *Id.* § 2302(b) (1) (A).

49. 16 C.F.R. § 702.

50. 15 U.S.C.A. § 2302(b) (1) (B). See also *Guides*, note 6 *supra*.

51. 15 U.S.C.A. § 2302(b) (3).

52. *Id.* § 2302(c). This is to prohibit the so-called "tie in" warranty. This provision is self-executing and needed no rules to become effective.

53. *Id.* § 2302(d).

54. *Id.* § 2303.

55. *Id.* § 2304.

warranty" or a "limited (statement of duration) warranty." (The \$10 limit has been changed by the rules to actually costing more than \$15.00.)⁵⁶ The designation must be set apart from the body of the warranty, be in conspicuous type and easily seen.⁵⁷ The Federal Minimum Standards for Warranty set out the minimum standards which a warranty must meet to be designated as a full warranty.

In order to meet the Federal Minimum Standards for Warranty, four requirements must be met. First, a warrantor must remedy a consumer product which does not conform to the warranty within a reasonable time and without charge. Second, a seller must not impose any limitation on the time duration of the implied warranties. Third, the warrantor who limits consequential damages must do so conspicuously on the face of the warranty. Fourth, the seller must allow a consumer to choose replacement or refund if the seller cannot remedy the product within a reasonable number of attempts.⁵⁸

In order for a remedy to be performed "without charge,"⁵⁹ the seller cannot charge the consumer for any costs which the warrantor or his representative incurs in connection with a full warranty. For example, if a product needs repair or a component needs replacement under a full warranty, the warrantor cannot charge for the labor necessary to remedy the product. If a manufacturer of storm windows must replace one after it has been installed on a house, the manufacturer cannot charge for the labor for installation regardless of whether the consumer paid for installation originally.⁶⁰

The definition of "without charge" states that the warrantor need not reimburse the buyer for incidental expenses⁶¹ unless these expenses arise out of an unreasonable duty imposed by the warrantor. Under section 104(b)(1) a warrantor can impose on the consumer only a duty of notification and those other duties which the warrantor can prove to be reasonable. The burden is on the manufacturer to show the reasonableness, otherwise a consumer can recover these costs in an enforcement proceeding.⁶²

Disclaimer of warranty duties are specifically handled under the minimum standards for full warranties. First, a seller cannot disclaim or limit the time duration of any implied war-

56. See notes 44-45 *supra*.

57. Enforcement Policy, note 9 *supra* at 25722.

58. The FTC by rule may determine what constitutes a reasonable number of attempts to repair. 15 U.S.C.A. § 2304(a)(4).

59. *Id.* § 2304(d) is the Act's definition of "without charge."

60. Enforcement Policy, note 9 *supra* at 25722.

61. See UCC § 2-715(1) for a definition of incidental expenses.

62. Magnuson Article, note 3 *supra* at 129-31.

ranty. All products which are fully warranted will have the implied warranties in force for four years, the usual length of the applicable statute of limitations period.⁶³ Second, if a seller decides to limit consequential damages,⁶⁴ it must be done conspicuously on the face of the warranty.⁶⁵ This should help to prevent consumer surprise. For example, if a refrigerator freezer breaks down a consumer would be aware that any spoilage of frozen foods would be his own responsibility. The consumer may thus act more quickly to prevent further loss.

However, any limitation of consequential damages should be considered in connection with the pertinent section of the UCC.⁶⁶ The UCC provides that if a limitation is "unconscionable," or where "circumstances cause an exclusive or limited remedy to fail of its essential purpose," the limitation is ineffective. The fact that these are consumer products may be "circumstances" which make limitation of consequential damages "unconscionable" and thus ineffective.

The final minimum standard for full warranties requires that the consumer have the option of choosing between replacement or refund if the product has not been remedied after a reasonable number of attempts.⁶⁷ However, it must be noted that a seller cannot refund unless replacement is impossible or the consumer is willing to accept a refund.⁶⁸

Other provisions in the minimum standards for full warranties provide that as a condition to replacement a warrantor may require that the product be made available or delivered free from any liens.⁶⁹ Duties under the minimum standards run to all those who are consumers in relation to the product.⁷⁰ Thus, under a full warranty, a warrantor who gives a fixed time duration warranty may be unable to limit its application to only the original purchaser. The section also provides that if a consumer product is designated as a full warranty, it will be treated as having met the minimum standards.

A manufacturer who does give a full warranty, however, is not an insurer of the warranted product. The Act expressly provides that a full warrantor is relieved of his warranty duties if he can show that the defect in the product was caused by

63. UCC § 2-725.

64. See *id.* § 2-715(2) for a definition of consequential damages.

65. 16 C.F.R. § 701.1(i), 40 Fed. Reg. 60188.

66. UCC § 2-719.

67. See note 58 *supra*.

68. 15 U.S.C.A. § 2301(10).

69. *Id.* § 2304(b)(2).

70. *Id.* § 2304(b)(4).

damage to the product, unreasonable use or improper maintenance by the consumer.⁷¹

Finally, the Act makes it clear that a warrantor may give a full and limited warranty on the same product provided they are clearly distinguished.⁷² For example, a car dealer may give a full warranty on the engine and a limited warranty on the rest of the car and its components.

Implied Warranties

Under the Act implied warranty is defined to mean those warranties arising under state law.⁷³ The implied warranties are the warranty of merchantability⁷⁴ and fitness for a particular purpose.⁷⁵ The definition is stated in terms of *supplier*, thus the implied warranties can arise only from businesses in the chain of distribution and in connection with sales of consumer products. For purposes of the Act, no implied warranty arises in a casual sale of a consumer product by a person not a supplier.⁷⁶

The Act specifically provides that if a warranty is given, the seller *cannot* disclaim the implied warranties of merchantability and fitness for a particular purpose.⁷⁷ This provision was put in to cure the situation where "[t]he bold print giveth and the fine print taketh away."⁷⁸ The section seeks to remedy the fact that nearly all warranties disclaim the implied warranties.⁷⁹

The first part of the section states that if a written warranty is given, no *supplier* may disclaim any implied warranty to a *consumer* with respect to the product.⁸⁰ However, the language indicates that it is the supplier that gives the written warranty who is prohibited from disclaiming the implied warranty. Thus, a retailer may be able to disclaim the implied warranties if the manufacturer is the supplier making the written warranty.⁸¹

The other parts of the section go on to state that implied warranties may be limited in duration to the length of a written

71. *Id.* § 2304(c). For a definition of "reasonable and necessary maintenance" see *id.* § 2301(9).

72. *Id.* § 2305.

73. *Id.* § 2301(7).

74. UCC § 2-314.

75. *Id.* § 2-315.

76. Under the UCC, for the implied warranty of merchantability to arise, the seller must be a merchant; however, the implied warranty of fitness for a particular purpose does not have this requirement.

77. 15 U.S.C.A. § 2308(a).

78. House Report, Admin. News, note 4 *supra* at 7706.

79. See Task Force Report, note 12 *supra* at 104.

80. 15 U.S.C.A. § 2308(a).

81. "No supplier may disclaim . . . (1) if such supplier makes any written warranty to the consumer with respect to such consumer product. . . ." *Id.*

warranty.⁸² However, to do so: a) the written warranty must be "reasonable"; b) the limitation must be "conscionable"; c) stated in clear and unmistakable language; and d) prominently displayed on the face of the warranty. It is also made clear that the Act supersedes state law on disclaimer of implied warranties. If a disclaimer of an implied warranty is made contra to the provisions of this section, that disclaimer is ineffective for purposes of the Act and state law.⁸³

This means that no matter what the warranty says, the implied warranties will be in effect on all consumer products sold with a written warranty for at least a reasonable time period.⁸⁴ Warranties on consumer products will have a legal effect more in line with the common consumer understanding. Consumer product warranties will now give consumers additional rights, and will no longer be mere limitations on manufacturers' liability.

Enforcement

The Act provides three theories of enforcement. First, it encourages informal dispute settlement procedures to settle differences between warrantors and consumers.⁸⁵ Next, the Act grants concurrent jurisdiction to the United States district courts and the various state courts for legal actions brought by consumers to enforce warranty obligations.⁸⁶ Finally, the Act gives the Attorney General and the FTC the power to bring actions in the United States district court to restrain violators of the Act and to obtain civil penalties.⁸⁷

Congress specifically states that its policy is to encourage informal settlements of disputes arising out of consumer warranties. Congress charged the FTC with the duty to prescribe rules establishing minimum requirements for informal dispute settlement procedures. These rules were established by the FTC and were published December 31, 1975. They become effective July 4, 1976.⁸⁸

The rules on informal dispute settlement procedures set out the requirements for establishment of a mechanism⁸⁹ designed to resolve consumer disputes in a fast and low cost manner. The

82. *Id.* § 2308(b).

83. *Id.* § 2308(c).

84. There is a distinction between "disclaimer" and "limitation" of implied warranties. If warranties are disclaimed they never come into effect. If warranties are limited they become effective but do not run for the entire statute of limitations period.

85. 15 U.S.C.A. § 2310(a).

86. *Id.* § 2310(d).

87. *Id.* § 2310(c).

88. 16 C.F.R. § 703, 40 Fed. Reg. 60215.

89. *Id.* § 703.1(e), 40 Fed. Reg. 60216.

rules set out requirements for information disclosure by the warrantor concerning the settlement procedure, which must be included in the warranty itself. The rules also set out the minimum requirements for funding and operation of the mechanism. The rules seek to guarantee that mechanisms will be operated in an open and independent manner in order to protect warrantors from unreasonable consumer claims, as well as to provide consumers with a forum where they can present their claims for resolution by an unbiased decision maker.

The Act itself contains two incentives for a warrantor to establish such an informal dispute settlement procedure. First, if a warrantor establishes a procedure in accordance with the rules and states in the warranty that the consumer must use the procedure, then a civil action under the Act can not be brought against the warrantor until the consumer resorts to the procedure.⁹⁰ This is to insure that if a warrantor establishes such an informal procedure, it will be used by the consumers and eliminate the possibility of initial bypass to the courts.

Second, if the consumer is dissatisfied with the results of the mechanism and still brings a suit (which is possible) then the decision of the settlement procedure is admissible into evidence in that suit. While the Act does not establish what weight a court is to give such a decision, it would appear that in most situations the decision of the mechanism should be followed. If the procedure meets the requirements of the rules, it is likely that the decision of the mechanism will be reasonable and based solely on the facts. This is further guaranteed by the supervisory responsibility given the FTC over such procedures.⁹¹ Thus, any suit brought after resort to an informal dispute settlement mechanism will be more similar to judicial review than a trial *de novo*. Therefore it seems likely that in most situations these informal decisions will be upheld.

The power of the FTC to enforce the provisions of the Act is extensive. Noncompliance with the terms of the Act is a violation of section 5 of the FTC Act⁹² and could subject the violator to fines of up to \$10,000 per day for each day of noncompliance. The FTC, as well as the Attorney General, has the power to institute suits in federal court to seek injunctive relief against any person for violations of the Act, or any regulation promulgated under it.

The Act grants concurrent jurisdiction over actions involving consumer warranties to the federal and state courts for

90. 15 U.S.C.A. § 2310(a)(3)(i).

91. *Id.* § 2310(a)(4).

92. *Id.* § 45(a)(1).

actions arising under the Act. There are two types of warranty injuries which need to be distinguished. On one hand there are those injuries resulting from a violation of a duty imposed by the Act. This would include injuries resulting from failure to disclose information or the imposition of an unreasonable duty on a consumer under a full warranty. The other and more usual action is for breach of warranty. Actions for breach of warranty can be brought under the Act provided certain prerequisites are met.

Under sections 111(b) (1) and (b) (2)⁹³ all state actions for breach of warranty, personal injury, and any other causes of action arising from the sale or use of a consumer product are preserved. Therefore a consumer always has the right to proceed in state court under an existing theory without resort to the Act.⁹⁴

However, if the consumer proceeds under the Act, attorney's fees (based on actual time expended) are recoverable as damages.⁹⁵ The Act requires a consumer to give the warrantor a reasonable opportunity to cure the breach before taking action. This would be done by resort to an informal settlement procedure, if one exists, or by direct contact with the warrantor.⁹⁶

Actions under section 110(d) can only be brought against the warrantor making the warranty.⁹⁷ Thus, in most cases actions under the Act will be brought by consumers against the manufacturer, since that is who usually provides the written warranty. A retail seller, although technically a warrantor under the Act,⁹⁸ will thus be spared the burdens of litigation over the warranty given by the original manufacturer.

Class actions are authorized under the Act.⁹⁹ Class actions can proceed no further than the determination of the representative of the class until the warrantor has been given a chance to cure, notwithstanding establishment of dispute settlement procedures. Upon determination of the class, it is assumed that any

93. *Id.* § 2311:

(b) (1) Nothing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law.

(2) Nothing in this chapter . . . shall (A) affect the liability of, or impose liability on, any person for personal injury, or (B) supersede any provision of State law regarding consequential damages for injury to the person or other injury.

94. 40 Fed. Reg. at 60191.

95. 15 U.S.C.A. § 2310(d) (2).

96. *Id.* § 2310(a) (3) and (e).

97. *Id.* § 2310(f). *Id.* § 2307 insures the right of the consumer to proceed directly against the warrantor. See also Magnuson Article, note 3 *supra* at 132-33.

98. See text accompanying notes 30-36 *supra*.

99. 15 U.S.C.A. § 2310(a) (3) and (e).

attempt by the warrantor to cure will be effective against all those affected by the alleged breach.

Finally, although the Act grants concurrent jurisdiction over actions involving consumer warranties, it is unlikely that much litigation will occur in the federal courts since the jurisdictional amount has been raised. To be able to get into federal court, a consumer will have to show: a) that the amount of any individual claim is at least \$25; b) that the amount in controversy must be at least \$50,000; and c) that if it is a class action, there must be at least 100 named plaintiffs.¹⁰⁰ These restrictions should effectively limit most litigation to the state courts.

SUMMARY AND CONCLUSION

While the Magnuson-Moss Warranty Act has the potential to reach every piece of personal property ever bought by a consumer, it applies only if a written warranty is given. It is expressly stated that nothing in the Act shall be deemed to require that a consumer product be warranted or to prescribe the duration of any given warranty.¹⁰¹ The Act neither creates a cause of action for personal injuries nor invalidates any cause of action arising under state law.¹⁰² A seller is still able to disclaim liability for consequential damages provided it is done in clear, conspicuous, and readily understandable language.¹⁰³ Thus it is apparent that a seller may limit his liability for property damage under the Act to providing a product that *works*. The Act does not make a seller an insurer of his product. A seller can still be relieved of the obligations under a warranty by showing that the damage or malfunction of the product was caused by the unreasonable or abusive use of the product by the consumer.¹⁰⁴

The major provisions of the Act, therefore, address *how* a warranty is made. It provides the method by which a consumer product warranty should be given and the means to insure compliance with the terms of the warranties. The Act does not grant new types of remedies to consumers or expand the scope of existing remedies available for breach of warranty.

Nevertheless, the Act has important implications. It should make warranties understandable to the average consumer. It will

100. *Id.* § 2310(d)(3).

101. *Id.* § 2302(b)(2): "Nothing in this chapter . . . shall be deemed to authorize the Commission to prescribe the duration of warranties given or to require that a consumer product or any of its components be warranted."

102. *Id.* § 2311(b)(2).

103. *Id.* § 2304(a)(3).

104. *Id.* § 2304(c).

stop the disclaimer of implied warranties which has made many present warranties nothing more than fancy sales tools. It should provide information to consumers on how and where to enforce warranties. Finally, the Act will force manufacturers to keep performance claims truthful and to evaluate their products honestly.

Ronald L. Lipinski