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William R. Kutner

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NOTES

CONSUMER PRODUCT WARRANTIES UNDER THE MAGNUSON-MOSS WARRANTY ACT AND THE UNIFORM COMMERCIAL CODE

The Magnuson-Moss Warranty Act¹ applies to sales of consumer products and modifies the applicability and operation of the warranties of quality of Article Two of the Uniform Commercial Code.² Both consumers and suppliers of ordinary goods are affected by the important and intricate changes arising from the resulting body of law. This Note will examine the effects of these modifications on planning sellers' consumer-product warranty obligations and resolving consumers' breach of warranty claims.

Although the UCC was promulgated primarily to govern mercantile transactions, Article Two also controls consumer transactions to the extent that it is neither displaced³ by special state

¹ Title I of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (Supp. V 1975) [hereinafter referred to as the Act]. With the exception of § 102(a), 15 U.S.C. § 2302(a) (Supp. V 1975) (standards for full and conspicuous disclosure of terms and conditions of written warranties on consumer products), the Act became effective on July 4, 1975 (15 U.S.C. § 2312(a) (Supp. V 1975)), but it does not apply to products manufactured prior to that date (even if sold on or after that date) (*id.*; Implementation and Enforcement Policy, pt. 1, 40 Fed. Reg. 25,721, 25,722 (1975) [hereinafter referred to as Enforcement Policy]). Section 102(a) of the Act became effective on June 30, 1976 (15 U.S.C. § 2312(b) (Supp. V 1975)), six months after the final publication of Federal Trade Commission (FTC) rules implementing that section. 16 C.F.R. §§ 701.1-702.3 (1976). The FTC has taken the position that the Act is effective as to rebuilt or replacement parts assembled or manufactured after July 4, 1975 (even if installed in consumer products manufactured prior to that date). Proposed Interpretations § 700.2, 41 Fed. Reg. 34,654, 34,655 (1976) (to be codified in 16 C.F.R. § 700.1-.12) [hereinafter referred to as Interpretations].

² UNIFORM COMMERCIAL CODE [hereinafter referred to as UCC or the Code]. All citations to the UCC are to the 1972 Official Text, except where specific local departures from that text are discussed.

The UCC has been adopted in 49 states, the District of Columbia, and the Virgin Islands. 1 U.L.A. 1 (Master ed. 1976). Louisiana recently adopted Articles One, Three, Four, and Five with considerable local variation and amendment of the Official Text. LA. REV. STAT. ANN. §§ 10:1-101 to 10:5-117 (West Supp. 1976). Each of the 51 enacting jurisdictions has deviated from the Official Text of the Code to some extent. For a comprehensive, state-by-state compilation of nonuniform provisions, see UCC REP. SERV. (State Correlation Tables). See note 31 *infra*.

³ A subsequently enacted statute that is *in pari materia* must be considered concurrently with the relevant Code sections. See UCC § 1-104 (Construction Against Implicit Repeal). Whenever possible, effect should be given to both statutes. *E.g.*, Sterling Accep-

consumer protection legislation⁴ nor superseded by federal law.⁵ Because it is aimed primarily at commercial transactions, the Code is essentially supplementary, not regulatory.⁶ As a result, the Code fills in the gaps—open terms—in skeletal or incomplete contracts,⁷ and most of the substance of Article Two can be disclaimed or varied by agreement of the parties.⁸ “Freedom of contract” is the general rule under the UCC;⁹ regulation is the exception.¹⁰ Therefore, sellers can,¹¹ and often do,¹² drastically limit their warranty

tance Co. v. Grimes, 194 Pa. Super. Ct. 503, 509, 168 A.2d 600, 603 (1961) (UCC and prior statute applicable). The Code shows an analogous resistance to judicial invalidation. See UCC § 1-108 (Severability). Consumer protection legislation antedating the Code was expressly preserved by § 2-102. The scope of this saving clause is limited to Article Two.

⁴ The most comprehensive example is California's Song-Beverly Consumer Warranty Act, CAL. CIV. CODE §§ 1790-1795.7 (West 1973 & Supp. 1976). This law does not abrogate the rights and obligations of the parties under the UCC except insofar as they are inconsistent with its requirements, in which case the consumer law prevails. *Id.* § 1790.3 (West 1973). Two other states have similar laws. See KAN. STAT. §§ 50-623 to 643 (Cum. Supp. 1975); MINN. STAT. ANN. §§ 325.951-.954 (West Cum. Supp. 1976). For analysis of the California, Kansas, and Minnesota statutes, see Clark & Davis, *Beeing Up Product Warranties: A New Dimension In Consumer Protection*, 23 U. KAN. L. REV. 567, 588-93, 594-97 (1975).

⁵ See, e.g., Clean Air Amendments of 1970, § 8(a), 42 U.S.C. § 1857f-5a(a) (1970) (automobile manufacturers required to give new car buyers warranty that new cars meet federal emission control standards).

⁶ See R. SPEIDEL, R. SUMMERS & J. WHITE, *TEACHING MATERIALS ON COMMERCIAL AND CONSUMER LAW* 2-5 (2d ed. 1974).

⁷ See, e.g., UCC § 2-305 (open price term); § 2-308 (absence of specified place for delivery); § 2-309 (absence of specific time provisions); § 2-310 (open time for payment).

⁸ See, e.g., UCC § 2-303 (allocation or division of risks); § 2-307 (delivery in single lot or several lots); § 2-312(3) (warranty against infringement); § 2-316 (exclusion or modification of warranties).

⁹ See UCC § 1-102(3)-(4) & Comments 2 & 3.

¹⁰ Even those provisions of the Code that are basically “regulatory” can be manipulated to a considerable extent. UCC § 1-102(3) provides, in part, that “the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed” But the impact of this section is substantially reduced by the following clause, which allows parties to set the “standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.” *Id.* The obligation to refrain from acting in an “unconscionable” manner (§§ 2-302, 2-719(3)) may not be disclaimed, but conscionability is such a vague and malleable concept that it cannot be considered “regulatory” in the ordinary sense. Only the duty of a warrantor to certain designated third-party beneficiaries (§ 2-318) is—in some cases—truly “immutable.” The draftsmen of the Code have proposed three alternative versions of § 2-318. Alternatives A and B provide, in pertinent part, that a “seller may not exclude or limit the operation of this section.” However, Alternative C provides, in pertinent part, that a “seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.” Ultimately, the regulatory effects of § 2-318 apply only when a warranty has been made and has not been successfully disclaimed or excluded.

¹¹ A seller can exclude parol evidence of express warranties (UCC § 2-202), disclaim all implied warranties (§ 2-316), modify or exclude warranties of title (§ 2-312(2)), “agree otherwise” as to warranties against infringement (§ 2-312(3)), limit remedies (§§ 2-718, 2-719(1)-(2)), and limit or exclude consequential damages to the extent permitted by § 2-719(3). A seller may also be able to show by “clear affirmative proof” that a representa-

liabilities under the Code. In most cases, "merchants"¹³ are expected to have sufficient knowledge and bargaining power to protect themselves while shaping their own transactions.¹⁴

Consumers usually do not have the expertise of merchants and almost always lack an appreciable modicum of bargaining power with respect to the substantive content of warranties. In fact, in the typical case the consumer's first opportunity to read the terms of a warranty occurs after the consummation of the sale, rather than during the "bargaining."¹⁵ Consumers, therefore, need the aid of regulatory laws which impose obligations that cannot be disclaimed or varied by the party with greater bargaining power, and which compensate for consumers' ignorance. Although the Magnuson-Moss Warranty Act purports to supply this much-needed protection,¹⁶ it does not displace the UCC entirely; it is a veneer that must be considered in conjunction with the Code.¹⁷

tion that would otherwise create an express warranty was not retained as part of the basis of the bargain. UCC § 2-313, Comment 3.

¹² H.R. REP. NO. 1107, 93d Cong., 2d Sess. 28 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7702, 7710.

¹³ UCC § 2-104(1) defines "merchant" as

a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

¹⁴ See, e.g., *id.* §§ 1-201(19), 1-203, 2-103(1)(b) (requirement of good faith); §§ 1-201(10), 2-316(2) (conspicuity); §§ 2-302, 2-719(3) (obligation to refrain from acting in an unconscionable manner). These requirements, among others, are thought to afford sufficient protection to merchant-buyers.

¹⁵ See, e.g., *Herbstman v. Eastman Kodak Co.*, 68 N.J. 1, 5, 342 A.2d 181, 183 (1975).

¹⁶ Suppliers of consumer products are not compelled to make warranties under the Act. 15 U.S.C. § 2302(b)(2)-(3) (Supp. V 1975). The Act attempts to induce suppliers to warrant the quality of their wares through increased competition and enhanced consumer awareness and understanding of warranties. See *id.* § 2302(a). See also H.R. REP. NO. 1107, 93d Cong., 2d Sess. 20 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7702, 7702. To this end, suppliers must comply with sophisticated disclosure and designation requirements. 15 U.S.C. §§ 2302(a)-(b), 2303(a) (Supp. V 1975); 16 C.F.R. §§ 701.1-702.3 (1976). See notes 73 & 133 *infra*. In addition, the power to disclaim or otherwise modify implied warranties is virtually eliminated when the transaction involves "written warranties" or "service contracts." See notes 70-81 and accompanying text *infra*.

¹⁷ The more parochial effects of the Act on local nonuniform amendments to the warranty (and related) sections of the Code are not discussed in this Note. See, e.g., ALA. CODE tit. 7A, § 2-316(5) (1966); ME. REV. STAT. tit. 11, § 2-316(5) (Cum. Supp. 1976); MD. COM. LAW CODE ANN. § 2-316.1 (1975); MASS. ANN. LAWS ch. 106, § 2-316A (Lawyers Co-op 1976); OR. REV. STAT. §§ 72.8010-.8200 (1975); VT. STAT. ANN. tit. 9A, § 2-316(5) (Cum. Supp. 1976); WASH. REV. CODE ANN. § 62A.2-316(4) (Supp. 1975); W. VA. CODE § 46A-6-107 (1976). This Note also does not discuss in detail the interaction of the Act and more comprehensive state consumer warranty laws (see note 4 *supra*) or other extra-Code state law (see, e.g., *Gable v. Silver*, 258 So. 2d 11 (Dist. Ct. App.), *aff'd per curiam*, 264 So. 2d 418 (Fla. 1972) (warranty on realty not covered by UCC Article Two)).

JUXTAPOSITION OF THE MAGNUSON-MOSS
WARRANTY ACT AND THE UCC

A. *Scope*

The scope of the Magnuson-Moss Warranty Act¹⁸ is narrower than the scope of the warranties of quality under Article Two of the Uniform Commercial Code.¹⁹ The Act is limited to "sales"²⁰ of "consumer products,"²¹ but, "[u]nless the context otherwise re-

¹⁸ Because the Act lacks a "scope provision" comparable to UCC § 2-102 (and related provisions) the extent of its applicability must be determined by referring to its definitional provisions. See 15 U.S.C. § 2301 (Supp. V 1975). Further guidance may be found in the FTC's Proposed Interpretations, 41 Fed. Reg. 34,654 (1976) (to be codified in 16 C.F.R. §§ 700.1-12 (partially superseding Enforcement Policy announced in 40 Fed. Reg. 25,721 (1975))). See also Modification of Implementation and Enforcement Policy, 41 Fed. Reg. 26,757 (1976). The Interpretations

are intended to clarify the requirements of the Act for consumers, manufacturers, importers, distributors and retailers. They are not, however, substantive rules, and do not have the force or effect of statutory provisions; like industry guides, they are advisory in nature. Failure to comply with them, however, may result in corrective action by the Commission under the applicable statutory provisions.

41 Fed. Reg. 34,654, 34,654 (1976).

¹⁹ UCC § 2-313 (express warranties by affirmations of fact, promises, descriptions, samples, or models); § 2-314 (implied warranty of merchantability and other implied warranties that may arise from course of dealing or usage of trade); § 2-315 (implied warranty of fitness for a particular purpose). As to the effects of the Act on UCC § 2-312 (warranties of title and against infringement), see notes 64-69 and accompanying text *infra*.

²⁰ See 15 U.S.C. § 2301(6)(A)-(B), (7) (Supp. V 1975). Professors Clark and Davis have suggested that the Act may extend to leases of consumer products. Clark & Davis, *supra* note 4, at 607 n.253. Their argument rests on the language in the Act defining a "supplier" and, therefore, a "warrantor" as "any person engaged in the business of making a consumer product directly or indirectly available to consumers." 15 U.S.C. § 2301(4) (Supp. V 1975) (emphasis added). See *id.* § 2301(5) (defining "warrantor"). This completely ignores the explicit definition of both "written" and "implied" warranties as being given in connection with the "sale" of a consumer product. *Id.* § 2301(6)(A)-(B), (7).

²¹ See 15 U.S.C. § 2301(6)(A)-(B), (7) (Supp. V 1975). The term "consumer product" is defined as

any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).

Id. § 2301(1). Congress specifically excluded seed for planting. *Id.* § 2311(a)(2); *cf.* Desert Seed Co. v. Drew Farmers Supply, Inc., 248 Ark. 858, 454 S.W.2d 307 (1970) (breach of express warranty by description on bag of seeds). Except for § 102(c), 15 U.S.C. § 2302(c) (Supp. V 1975) (see note 78 and accompanying text *infra*), the Act does not apply to written warranties otherwise governed by federal law. 15 U.S.C. § 2311(d) (Supp. V 1975). See note 5 and accompanying text *supra*. The FTC may also exclude certain products from the coverage of the Act. For example, since "no appreciable portion of new aircraft are sold to consumers, for personal, family or household use" (Modification of Implementation and Enforcement Policy, 41 Fed. Reg. 26,757 (1976)), the FTC has taken the position that "general aviation aircraft are not among the products whose users Congress intended to protect under the Act's regulatory scheme for consumer product warranties." *Id.* This ap-

quires," the Code embraces "transactions in goods."²² There are five significant distinctions. First, by using the term "transactions" in the scope provision of an article concerned primarily with sales,²³ the draftsmen of the Code probably intended the Code to apply to commercial dealings that are not sales in the strict sense.²⁴ Indeed, a number of courts apply the Code's warranty and related sections to a variety of nonsales transactions, particularly chattel leases.²⁵ Second, the Article Two warranties apply to all "goods" whether they are "consumer goods" or not.²⁶ Third,

proach follows an objective reading of the definition of "consumer product"; products not normally used as consumer products are not covered by the Act, even though in a particular case a consumer owns the product and puts it to a personal, family, or household use. See generally Interpretations, *supra* note 1, § 700.1, 41 Fed. Reg. 34,654-55 (1976); Enforcement Policy, pt. 2, 40 Fed. Reg. 25,721, 25,722 (1975).

Unlike the UCC (*see* note 26 *infra*), the Act is concerned only with the characteristics of the product, not those of the buyer. However, this is not necessarily the case with the rules promulgated under the Act. Under the rules, the character of the buyer, not the product, may determine the applicability of the rules. See, e.g., 16 C.F.R. § 702.1(b) (1976) (exempts products purchased solely for commercial or industrial use from the requirements of 16 C.F.R. §§ 702.1-3 (1976) (relating to Pre-Sale Availability of Written Warranty Terms)). This, too, highlights the objective nature of the test for a consumer product under the Act: even though a product is used commercially or industrially in a particular instance, it is a consumer product within the meaning of § 101(1), 15 U.S.C. § 2301(1) (Supp. V 1975), if it is normally used for personal, family, or household purposes. But, of course, nothing in the Act compels a supplier to offer written warranties on consumer products destined for commercial or industrial use.

Although § 102(b)(1)(A), 15 U.S.C. § 2302(b)(1)(A) (Supp. V 1975), clearly states that the FTC "shall" prescribe rules requiring pre-sale availability of the terms of written warranties on consumer products, such terms must be disclosed only to the extent required by the rules of the Commission. 15 U.S.C. § 2302(a) (Supp. V 1975). The FTC's position is that any ambiguity or doubt as to coverage under the Act will be resolved in favor of coverage. Interpretations, *supra* note 1, § 700.1(b), 41 Fed. Reg. 34,654 (1976).

²² UCC § 2-102.

²³ See *id.* § 2-101 & Comment.

²⁴ The Code is "drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices." UCC § 1-102, Comment 1. "[W]arranties need not be confined either to sales contracts or to the direct parties to such a contract." *Id.* § 2-313, Comment 2. See *id.* § 1-102(1), (2)(a)-(b).

²⁵ See Davenport, *Recent Developments Under Article 2—Sales*, 4 U.C.C.L.J. 238-41 (1972); Greenfield, *Consumer Protection in Service Transactions—Implied Warranties and Strict Liability in Tort*, 1974 UTAH L. REV. 661; Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORDHAM L. REV. 447, 449-54, 464-72 (1971); Annot., 48 A.L.R.3d 668 (1973); Comment, *Sale of Goods In Service-Predominated Transactions*, 37 FORDHAM L. REV. 115 (1968). See also Farnsworth, *Implied Warranties of Quality In Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957); Comment, *Sales-Service Hybrid Transactions: A Policy Approach*, 28 Sw. L.J. 575 (1974).

²⁶ Under the Code, "goods" are "consumer goods" if "they are used or bought for use primarily for personal, family or household purposes." UCC § 9-109(1). This definition is applicable to Article Two. § 2-103(3). Arguably, the entire taxonomy of "goods" in § 9-109 is applicable to Article Two by virtue of § 2-103(3), but it will be sufficient for Article Two

Article Two recognizes a goods-fixtures distinction,²⁷ but the Act does not.²⁸ Fourth, the test for "consumer products" under the Act is objective, while the test for "consumer goods" under the Code is subjective.²⁹ Fifth, sales of consumer products must affect interstate commerce to come within the purview of the Act;³⁰ the UCC lacks such a requirement.³¹

warranty purposes to distinguish between consumer goods and nonconsumer goods. The chief importance of the designation of goods as "consumer goods" for Article Two purposes is that "[l]imitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable . . ." § 2-719(3). In addition, the standards applicable to consumer-buyers may differ from those applicable to merchant-buyers—even when the goods are not "consumer goods." Courts may be more prone to find the seller's behavior unconscionable (§ 2-302) or lacking in "good faith" (§§ 1-201(19), 1-203 & Comment, 2-103(1)(b)) in cases involving a consumer-buyer. Whether the buyer's behavior is "reasonable" may depend on whether he is a consumer or a merchant. *See, e.g.*, § 2-607(3)(a) & Comment 4; *cf.* § 1-204(2) (reasonableness of time for taking any action depends upon nature, purpose, and circumstances of such action).

²⁷ *See id.* § 2-105(1) (definition of "goods"). Section 2-107(2) sweeps certain things "attached to realty and capable of severance without material harm thereto" into the definition of goods when there is a contract for their "sale apart from the land." Fixtures incorporated into buildings that are for sale are not goods. *See, e.g.*, *Foster v. Colorado Radio Corp.*, 381 F.2d 222, 225-26 (10th Cir. 1967) (UCC not applicable to radio station transmission equipment).

²⁸ *See* 15 U.S.C. § 2301(1) (Supp. V 1975), set forth in note 21 *supra*. However, whether implied warranties covering fixtures arise under state law is a question governed by extra-Code law. *See* *Gable v. Silver*, 258 So. 2d 11 (Dist. Ct. App.), *aff'd per curiam*, 264 So. 2d 418 (Fla. 1972). *See* note 17 *supra*.

²⁹ *Compare* 15 U.S.C. § 2301(1) (Supp. V 1975), with UCC §§ 9-109(1), 2-103(3). The significance of this distinction is greatest in those occasional cases where the goods will be "goods" for the purposes of Article Two but will not be "consumer products" for purposes of the Act (*e.g.*, the "family bulldozer" or a "personal submarine"). *See* note 21 *supra*; *cf.* Modification of Implementation and Enforcement Policy, 41 Fed. Reg. 26,757 (1976) (determination respecting small aircraft). In these cases, the Code will apply but the Act will not. The reverse is also possible. In cases where the goods are normally bought for personal, family, or household purposes but not actually bought for such a purpose (*e.g.*, an automobile bought for use in business), the Act will apply, but Article Two's special treatment of "consumer goods" (*see* note 26 *supra*) will not. *Compare* Interpretations, *supra* note 1, § 700.1(b), 41 Fed. Reg. 34,654 (1976), with UCC §§ 9-109(1)-(2), 2-103(3).

³⁰ 15 U.S.C. § 2301(1), (13)-(14) (Supp. V 1975). Because almost anything affects interstate commerce (*see, e.g.*, *Fry v. United States*, 421 U.S. 542, 547 (1975)), very few, if any, warrantors will be excluded from the coverage of the Act on the basis of this limitation.

³¹ Whenever the transaction in question "bears a reasonable relation" to more than one jurisdiction, possible conflict-of-laws problems arise. UCC § 1-105. Despite its name, the Code is not "uniform," and has not produced uniform results among the enacting jurisdictions. Four factors are responsible for this failure. First, § 1-103, among others, sweeps a great deal of nonuniform state law into the Code. Second, despite the command of § 1-102(1), (2)(c), that the UCC be construed "to make uniform the law among the various jurisdictions," the Code is subject to divergent construction in the various courts of the 51 enacting jurisdictions. *Compare* *Fairchild Indus. v. Maritime Air Serv., Ltd.*, 274 Md. 181, 333 A.2d 313 (1975) (§ 2-316(2) conspicuity requirement imposed on "as is" disclaimers under § 2-316(3)(a)), with *DeKalb Agresearch, Inc. v. Abbott*, 391 F. Supp. 152 (N.D. Ala. 1974)

B. Warranty Types

The Code sales warranties³² include express warranties,³³ implied warranties of "merchantability"³⁴ and "fitness for [a] particular purpose,"³⁵ "other implied warranties [which] may arise from course of dealing or usage of trade,"³⁶ warranties of title,³⁷ and warranties against infringement.³⁸ The Magnuson-Moss Warranty Act deals with "written warranties,"³⁹ "implied warranties,"⁴⁰ and "service contracts."⁴¹ "Written warranties" under the Act has a narrower meaning than "express warranties" under the Code. Section 101(6) of the Act⁴² provides:

The term "written warranty" means—

(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a

(§ 2-316(3)(a) literally construed), *aff'd per curiam*, 511 F.2d 1162 (5th Cir. 1975). Third, the Code contains a number of optional alternative provisions. *E.g.*, UCC § 2-318(A), (B), (C). Fourth, and perhaps most significant, each of the 51 enacting jurisdictions has subjected the Code to a variety of nonuniform amendments. *See, e.g.*, J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 3 (1972). *See note 2 supra*. The warranty sections of Article Two are no exception. *See, e.g.*, statutes cited in note 17 *supra*.

³² For an extensive discussion of the Code warranties, see J. WHITE & R. SUMMERS, *supra* note 31, §§ 9—1 to 9—12.

³³ UCC § 2-313.

³⁴ *Id.* § 2-314(1)-(2).

³⁵ *Id.* § 2-315.

³⁶ *Id.* § 2-314(3).

³⁷ *Id.* § 2-312(1).

³⁸ *Id.* § 2-312(3).

³⁹ *See, e.g.*, 15 U.S.C. §§ 2301(6) (definition), 2302-2304 (Supp. V 1975).

⁴⁰ *See, e.g., id.* §§ 2301(7) (definition), 2304(a)(2), (a)(3), 2308(a)-(b).

⁴¹ *See, e.g., id.* §§ 2301(8) (definition), 2306, 2308 (a)-(b). *See note 75 infra*. The FTC takes the position that *to the extent* that "service contracts" are regulated under state insurance laws, the Act does not apply. Interpretations *supra* note 1, § 700.11(a), 41 Fed. Reg. 34,654, 34,656 (1976); *see* McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1970).

The Attorney General of the State of New York, in an opinion concerning doing business as an insurance company without a license, recently stated that the distinction between a warranty and an insurance contract relates to the element of "fortuitousness." A manufacturer, retailer, or repairer of a product has "sufficient control" over its proper operation to issue a warranty without being deemed to be an insurer. However, a third party, not a manufacturer, retailer, or repairer, who issues a so-called warranty for a period of time covering free parts and free service is doing an insurance business because that party lacks sufficient control to eliminate the element of fortuitousness. *See* 87 INS. ADVOCATE No. 34, at 4 (1976). Suppliers of oil used for residential heating purposes are the paradigm example. Often a contract for the sale of oil entitles the buyer to protection against oil burner breakdowns, even where the supplier of oil is not the supplier of the particular heating equipment. *Id.*

⁴² 15 U.S.C. § 2301(6) (Supp. V 1975). The following definitional cross-references are relevant: § 2301(1) ("consumer product"); § 2301(4) ("supplier"); § 2301(10) ("remedy"); § 2301(11) ("replacement"); § 2301(12) ("refund").

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

(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 bargain between a supplier and a buyer for purposes other than resale of such product.

Although the "basis of the bargain" requirement is common to the Act and the Code,⁴³ there are a number of important distinctions. First, oral representations may create express warranties under the UCC;⁴⁴ the Act governs only "written affirmation[s] of fact or written promise[s]"⁴⁵ and "undertaking[s] in writing."⁴⁶ Second, representations giving rise to express warranties under the Code may be in the form of affirmations of fact, promises, descriptions, samples, or models,⁴⁷ but the Act recognizes only affirmations of fact, promises, and undertakings.⁴⁸ Thus, because the Act does not "invalidate or restrict any right or remedy of any consumer under State law,"⁴⁹ consumers still have the benefits of any express warranties that arise under the UCC. Third, the written warranties described in section 101(6)(A) must relate to the "nature of the material or workmanship" and must affirm or promise that such material or workmanship is either "defect free" or that it will "meet a specified level of performance over a specified period of time."⁵⁰ Conceivably, some written express warranties arising from affirmations of fact or promises will not meet these requirements, but they will be within the ambit of UCC section 2-313(1)(a).

⁴³ See UCC § 2-313(1); 15 U.S.C. § 2301(6) (Supp. V 1975).

⁴⁴ See, e.g., *Fred J. Miller, Inc. v. Raymond Metal Prods. Co.*, 265 Md. 523, 290 A.2d 527 (1972).

⁴⁵ 15 U.S.C. § 2301(6)(A) (Supp. V 1975).

⁴⁶ *Id.* § 2301(6)(B). Warranties created by "undertakings" have no direct counterpart in the UCC. Discussion of this feature of the Act appears in the text accompanying notes 98-104 *infra*.

⁴⁷ UCC § 2-313(1).

⁴⁸ 15 U.S.C. § 2301(6) (Supp. V 1975).

⁴⁹ *Id.* § 2311(b)(1). The definition of "remedy" in 15 U.S.C. § 2301(10) (Supp. V 1975) has no relevance to the intended meaning of "remedy" as it is used in § 2311(b)(1). The draftsmen obviously meant "judicial remedies" in § 2311(b)(1). 15 U.S.C. § 2301(10) is set forth in note 84 *infra*.

⁵⁰ 15 U.S.C. § 2301(6)(A) (Supp. V 1975).

Fourth, although advertising or labels and tags may create express warranties under the UCC,⁵¹ written warranties under the Act must be made "in connection with the sale of a consumer product."⁵² Whether advertising bears a close enough relationship to *particular* sales to create written warranties under the Act is, at best, doubtful. Although closer both in time and space to particular sales, labels and tags cause many practical problems, such as designating warranties as either "full" or "limited."⁵³ Congress probably did not intend to include them within the coverage of the Act.⁵⁴ Fifth, section 103(b) of the Act exempts from the operation of the Act's three major sections⁵⁵ "expressions of general policy concerning customer satisfaction" if they "are not subject to any specific limitations." Such statements may, however, create rights under section 110 of the Act⁵⁶ and section 5 of the Federal Trade Commission Act;⁵⁷ the Code lacks a direct counterpart.

Despite all these differences, when there is a substantial federal claim under the Act, consumers may be able to litigate their related UCC claims in federal court on the basis of pendent

⁵¹ See, e.g., *Swenson v. Chevron Chem. Co.*, 234 N.W.2d 38 (S.D. 1975) (labels); *Huebert v. Federal Pac. Elec. Co.*, 208 Kan. 720, 494 P.2d 1210 (1972) (advertisements).

⁵² 15 U.S.C. § 2301(6)(A) (Supp. V 1975). See *id.* § 2301(6)(B).

⁵³ See notes 70-73 and accompanying text *infra*.

⁵⁴ The FTC has taken the position that

[c]ertain representations, such as energy efficiency ratings for electrical appliances, care labeling of wearing apparel and other product information disclosures may be express warranties under the Uniform Commercial Code. However, these disclosures alone are not written warranties under this Act. Section 101(6) [15 U.S.C. § 2301(6)] provides that a written affirmation of fact or a written promise of a specified level of performance must relate to a specified period of time in order to be considered a "written warranty". A product information disclosure without a specified time period to which the disclosure relates is therefore not a written warranty. . . . The Commission encourages the disclosure of product information which is not deceptive and which may benefit consumers, and *will not construe the Act to impede information disclosure in product advertising or labeling.*

Interpretations, *supra* note 1, § 700.3(a), 41 Fed. Reg. 34,654, 34,655 (1976) (footnote omitted) (emphasis added). There is further evidence that Congress did not intend labels and advertising to create written warranties since the Act directs the FTC to establish rules regarding the availability of the warranty itself under § 102(b)(1)(A), 15 U.S.C. § 2302(b)(1)(A) (Supp. V 1975), but merely grants the Commission discretion to establish rules for the presentation of information about those terms in advertising, labeling, and similar materials under § 102(b)(1)(B), 15 U.S.C. § 2302(b)(1)(B) (Supp. V 1975).

⁵⁵ 15 U.S.C. §§ 2302-2304 (Supp. V 1975).

⁵⁶ *Id.* § 2310 (unfair methods of competition outlawed). See Interpretations, *supra* note 1, § 700.5(a), 41 Fed. Reg. 34,654, 34,655 (1976); notes 142-62 and accompanying text *infra*.

⁵⁷ 15 U.S.C. § 45 (Supp. V 1975), See Interpretations, *supra* note 1, § 700.5(a), 41 Fed. Reg. 34,654, 34,655 (1976). The FTC has stated that, in order to enjoy the § 103(b) exemption, the warrantor must maintain a general policy "concerning customer satisfaction" with respect to *all* its products. *Id.* § 700.5(b).

jurisdiction,⁵⁸ subject to the prerequisites for cognizance of the federal claim.⁵⁹ Typically, all such breach of warranty claims will arise out of a "common nucleus of operative fact"—the sine qua non of pendent jurisdiction.⁶⁰

The Act defines an "implied warranty" in section 101(7)⁶¹ as "an implied warranty arising under State law (as modified by sections 108 and 104(a)) in connection with the sale by a supplier of a consumer product." The modifications relate to impairment of the power of disclaimer⁶² and the power to limit the duration of implied warranties that have not been effectively disclaimed.⁶³

Sections 104 and 108 of the Act,⁶⁴ in addition to modifying the state law definition of implied warranty under the Act, regulate the substantive terms and effect of both express and implied warranties. The impact of these sections on warranties of title and warranties against infringement is unclear, however, because nothing in the text of UCC section 2-312 categorizes such warranties as "express" or "implied." Section captions are part of the Code,⁶⁵ and thus can aid in its construction, but, unlike UCC sections 2-313, 2-314, and 2-315, the caption to section 2-312 does not designate the warranties it covers as express or implied. Although Comment 6 to section 2-312 states that the warranty of title cannot be disclaimed under UCC section 2-316(3) because it is not designated as an implied warranty, Professors White and Summers have pointed out that this Comment concerns only the *method* of disclaimer, not the character of the warranty.⁶⁶ "In practical effect, the warranty of title may be regarded as implied since it need not be expressed."⁶⁷ Neither the Comments to UCC section 2-312 nor White and Summers specifically take a position on the characterization of the warranty against infringement. No reported case discusses any aspect of this problem. In the final analysis, despite the expression "*any* implied warranty" in sections 104(a) and 108(a) of

⁵⁸ See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Although a pendent state law claim will not necessarily fall if the parent claim is dismissed, there must be a plausible federal claim at the outset. *Id.*

⁵⁹ The jurisdictional requirements in consumer product warranty cases are spelled out in 15 U.S.C. § 2310 (Supp. V 1975).

⁶⁰ *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

⁶¹ 15 U.S.C. § 2301(7) (Supp. V 1975). The following definitional cross-references are relevant: § 2301(1) ("consumer product"); § 2301(4) ("supplier"); § 2301(15) ("state law").

⁶² 15 U.S.C. § 2308(a) (Supp. V 1975).

⁶³ *Id.* §§ 2304(a)(2), 2308(a)-(b).

⁶⁴ *Id.* §§ 2304, 2308.

⁶⁵ UCC § 1-109.

⁶⁶ J. WHITE & R. SUMMERS, *supra* note 31, § 9—10 & n.100.

⁶⁷ *Id.* § 9—10 n.100.

the Act,⁶⁸ a court faced with the issue might emphasize that the Magnuson-Moss Warranty Act is primarily concerned with warranties of *quality*, and thus hold that the operation of section 104 and 108 are limited to warranties arising under UCC sections 2-314 and 2-315. In addition, there is nothing in the legislative history to indicate that a construction embracing section 2-312 was intended. On the other hand, the draftsmen could have used the expression "warranties of merchantability or fitness for a particular purpose, or other implied warranties arising from course of dealing or usage of trade," instead of "any implied warranty," if that is what they intended. Finally, the policy of the Act is to give consumers a meaningful bundle of warranty rights. It would be odd to improve the warranties of quality and leave room for the supplier to deny good title. In the end this may prove to be a tempest in a teapot; there are only a few reported cases in which the buyer of consumer goods sued the seller for breach of the warranty of title or the warranty against infringement.⁶⁹

C. *Disclaimers, Designations, Damages, and Remedies*

There is no obligation to give a written warranty under the Act.⁷⁰ If a supplier so chooses, he may give a "full (statement of duration) warranty"⁷¹ or a "limited warranty"⁷² or both.⁷³ Section

⁶⁸ 15 U.S.C. §§ 2304(a), 2308(a) (Supp. V 1975) (emphasis added).

⁶⁹ See, e.g., *Jones v. Linebaugh*, 34 Mich. App. 305, 191 N.W.2d 142 (1971) (seller's disclaimer under UCC § 2-312(2) held insufficient).

⁷⁰ See 15 U.S.C. § 2302(b)(2)-(3) (Supp. V 1975).

⁷¹ *Id.* § 2303(a)(1). For example, the warrantor may indicate that the product is covered by a "full two-year warranty."

⁷² *Id.* § 2303(a)(2). Like full warranties, limited warranties may be for a stated duration only. Enforcement Policy, pt. 3, 40 Fed. Reg. 25,721, 25,722 (1975). The obligation to designate warranties as "full" or "limited" applies only to products that actually cost the consumer more than \$10. 15 U.S.C. § 2303(d) (Supp. V 1975).

⁷³ 15 U.S.C. § 2305 (Supp. V 1975). This section evidently contemplates a "full" warranty on some parts of a complex consumer product and a "limited" warranty on others. Efforts to divide warranties into full and limited warranties on a chronological basis—for example, a "full one-year warranty" followed by a "two-year limited warranty" on the same consumer product—would run afoul of the provision of the Act that eliminates the power to limit the duration of implied warranties if a full warranty is given. See notes 82-97 and accompanying text *infra*. However, if no limitation on the duration of the implied warranty is attempted, then a limited warranty might properly follow a full warranty on a particular consumer product or part.

The terms "full (statement of duration) warranty" and "limited warranty" (or "(statement of duration) limited warranty") are the exclusive designations a warrantor may use under § 103(a), 15 U.S.C. § 2303(a) (Supp. V 1975), unless the FTC, by rule, creates an exception under § 103(c), 15 U.S.C. § 2303(c). See Interpretations, *supra* note 1, § 700.6(a), 41 Fed. Reg. 34,654, 34,655 (1976). The obligation to designate applies only if the con-

108(a) of the Act⁷⁴ provides that if any written warranty is given, or if the supplier enters into a service contract⁷⁵ with the consumer within ninety days of the time of the sale, there can be no disclaimer of implied warranties. In addition, this triggers the Act's disclosure and designation requirements.⁷⁶ Further, the supplier loses the power to condition the warranty on the consumer's use—in connection with the warranted product—of other products or services identified by a brand, trade, or corporate name, unless such products or services are provided to the consumer free of charge.⁷⁷ The Federal Trade Commission, however, has power to

sumer product actually costs the consumer more than \$10, exclusive of taxes. 15 U.S.C. § 2303(d) (Supp. V 1975); Interpretations, *supra* note 1, § 700.6(a), 41 Fed. Reg. 34,654, 34,655 (1976); H.R. REP. No. 1107, 93d Cong., 2d Sess. 36 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7702, 7719. It appears that the terms "guaranty" and "guarantee" should no longer be used for the purpose of designation. See Enforcement Policy, pt. 5, 40 Fed. Reg. 25,721-22 (1975).

⁷⁴ 15 U.S.C. § 2308(a) (Supp. V 1975).

⁷⁵ The term "service contract" is defined in 15 U.S.C. § 2301(8) (Supp. V 1975) as: "a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair (or both) of a consumer product." The FTC adds this analysis:

An agreement which would meet the definition of written warranty in Section 101(6)(A) or (B) [15 U.S.C. § 2301(6)(A) or (B)] but for its failure to satisfy the basis of the bargain test is a service contract. For example, an agreement which calls for some consideration in addition to the purchase price of the consumer product, or which is entered into at some date after the purchase of the consumer product to which it applies, is a service contract. An agreement which relates only to the performance of maintenance and/or inspection services and which is not an undertaking, promise or affirmation with respect to a specified level of performance, or that the product is free of defects in materials or workmanship, is a service contract. An agreement to perform periodic cleaning and inspection of a product over a specified period of time, even when offered at the time of sale and without charge to the consumer, is an example of such a service contract.

Interpretations, *supra* note 1, § 700.11(c), 41 Fed. Reg. 34,654, 34,656-57 (1976). Such service contracts have no analogue in the Code. The Act's draftsmen wisely anticipated that crafty sellers of consumer products might try to circumvent the warranty provisions by offering only service contracts to consumers. Service contracts may still be used in conjunction with or in lieu of written warranties (15 U.S.C. § 2306(b) (Supp. V 1975)), but the service contractor has no right to disclaim implied warranties or limit their duration if he gives only a service contract (*id.* § 2308(a)-(b)).

It is not clear whether the duration of implied warranties may be limited when a service contract is combined with a limited warranty. Entering into a service contract within 90 days of the sale triggers 15 U.S.C. § 2308(a)(2), but the use of a limited warranty brings into operation § 2308(b) with its requirement of "reasonable duration." Perhaps a supplier must wait until the expiration of 90 days from the time of the sale before entering into a service contract in order to avoid § 2308(a)(2). However, whether a 90-day limited warranty lasts for a sufficiently "reasonable" duration to satisfy § 2308(b) is not clear and may vary among products.

⁷⁶ As to the Act's mandatory disclosure provisions, see notes 133-34 and accompanying text *infra*. The designation requirement is discussed in note 73 *supra*.

⁷⁷ 15 U.S.C. § 2302(c) (Supp. V 1975); see Interpretations, *supra* note 1, § 700.10, 41

grant exceptions in proper cases.⁷⁸ If a supplier either makes a

Fed. Reg. 34,654, 34,656 (1976); note 85 *infra*. This rule applies only to products that cost the consumer more than \$5. 15 U.S.C. § 2302(e) (Supp. V 1975). A limited warranty may provide for free replacement of defective parts without covering the cost of necessary labor. See Interpretations, *supra* note 1, § 700.10(b), 41 Fed. Reg. 34,654, 34,656 (1976); *cf.* 15 U.S.C. § 2304(a)(1) (Supp. V 1975) (warrantor must remedy defect within reasonable time and "without charge"). The FTC takes the position that under such a limited warranty no condition requiring the consumer to purchase the necessary services from any particular person or business can be imposed. Interpretations, *supra* note 1, § 700.10(a)-(b), 41 Fed. Reg. 34,654, 34,656 (1976). Further, no warrantor may condition the continued validity of a warranty on the use of authorized service or authorized replacement parts for nonwarranty maintenance. *Id.* § 700.10(c). See also *id.* § 700.10(d). The FTC is of the opinion that this violates the Act's proscription of product or service tie-in arrangements, and also constitutes a deceptive warranty practice under § 110(c)(2) of the Act, 15 U.S.C. § 2310(c)(2) (Supp. V 1975) "because a warrantor cannot, as a matter of law, avoid liability under a written warranty where a defect is unrelated to the use by a consumer of 'unauthorized' articles or service." Interpretations, *supra* note 1, § 700.10(c), 41 Fed. Reg. 34,654, 34,656 (1976). However, the warrantor can exclude and deny liability for defects or damage caused by such "unauthorized" articles or service. *Id.* Finally, the Act's anti-tie-in rules do not repeal, supersede, or invalidate the Federal Trade Commission Act or any other federal law defined therein as an antitrust law. 15 U.S.C. § 2311(a)(1) (Supp. V 1975).

⁷⁸ 15 U.S.C. § 2302(c) (Supp. V 1975) provides that the FTC may waive the prohibition against conditioning a warranty upon the customer's use of an identified product or service if:

- (1) the warrantor satisfies the Commission that the warranted product will function properly only if the article or service so identified is used in connection with the warranted product, and
- (2) the Commission finds that such a waiver is in the public interest.

That section further specifies the procedure the FTC must follow in disposing of such applications for waivers. The nature of the application procedure is detailed in Enforcement Policy, pt. 10, 40 Fed. Reg. 25,721, 25,723 (1975). Applicants may request that documents they submit remain confidential. *Id.* In considering applications the Commission may invite other parties to submit comments and opinions. *Id.*

Thus far, Sohmer & Co., Inc. (manufacturer of pianos), Harmsco, Inc. (manufacturer of swimming pool equipment), and Coleman Co., Inc. (manufacturer of heating and cooling equipment for mobile homes) have made the only three applications. 40 Fed. Reg. 49,409-10 (1975); *id.* at 58,698; 41 Fed. Reg. 53,708 (1976). The FTC denied the Sohmer application on the ground that the applicant had failed to meet its burden of proof on the necessity of a tie-in. 41 Fed. Reg. 17,821 (1976). Harmsco's application was denied because the exhibits it submitted were not responsive to the proper issues. 41 Fed. Reg. 34,368 (1976). First, Harmsco showed that its products, swimming pool filters used in conjunction with Harmsco's replaceable cartridges, were superior to other *methods* of filtration, not other *brands* of filter cartridges. Second, the FTC took the position that the "proper functioning" standard does not necessarily require the "best functioning" of the product. Thus, merely showing superior performance when the warranted product is used in connection with the tied-in product is insufficient to satisfy the standard. The applicant must show that the warranted product does not work *properly* without the tied-in product; consumers are entitled to accept less than optimal performance of the warranted product if they so choose. Finally, the Commission took the position that, even though a tie-in by a brand, trade, or corporate name is generally not permissible under the Act, the warrantor may specify particular "objective specifications" for products used in conjunction with the warranted products, as long as such specifications are "reasonably related" to the warranted product's performance and are not merely a disguise for an illegal tie-in. *Id.* The Coleman application was still pending when this issue went to press.

"full warranty" or enters into a service contract with a consumer in lieu of a written warranty within ninety days of the sale, no limit may be imposed upon the duration of implied warranties.⁷⁹ If the written warranty is "limited," then a supplier may, under certain circumstances, be able to limit the duration of implied warranties.⁸⁰ Any attempted disclaimer, modification, or limitation made in violation of section 108 is deemed to be ineffective for purposes of the Act and state law.⁸¹

To make a "full warranty," a warrantor must either voluntarily comply with the federal minimum standards for warranty in section 104 of the Act⁸² or designate his warranty as a "full warranty," in which case it is automatically deemed to incorporate at least the federal minimum standards.⁸³ The federal minimum standards consist of five elements. First, the warrantor must, as a minimum, "remedy"⁸⁴ any breach of warranty "without charge"⁸⁵ and within a

⁷⁹ 15 U.S.C. §§ 2304(a)(2), 2308(a) (Supp. V 1975).

⁸⁰ *Id.* § 2308(b). The duration of implied warranties may be limited to the duration of a "limited" written warranty if: (1) that duration is reasonable; (2) such a limitation is not unconscionable; (3) the limitation is set forth in "clear and unmistakable language"; and (4) the language is "prominently displayed on the face of the warranty." *Id.* Until some case law on the subject develops, the minimum limits of a "reasonable duration" will remain uncertain. The FTC is not expressly empowered to establish rules on this matter. *See id.* § 2302(b)(2)-(3). The third and fourth requirements are subject to FTC rulemaking power. *Id.* § 2302(a)(6); 16 C.F.R. § 701.3(a)(7) (1976). The fourth requirement is probably somewhat stricter than "conspicuity" because the information must actually appear on the *face* of the warranty. UCC disclaimers may be "conspicuous" even when printed on the reverse side of a contract document if appropriate indications are printed on the front. *Childers & Venters, Inc. v. Sowards*, 460 S.W.2d 343 (Ky. 1970). *See* UCC § 1-201(10).

⁸¹ 15 U.S.C. § 2308(c) (Supp. V 1975). This is an added incentive for suppliers to comply with the Act: the consumer may immediately sue on his UCC claim without first exhausting any mandatory informal dispute resolution process and the supplier's disclaimers would be *totally* ineffective. *See* notes 182-84 and accompanying text *infra*.

⁸² 15 U.S.C. § 2304 (Supp. V 1975).

⁸³ *Id.* § 2304(e). This is so, in the opinion of the FTC, even where the product does not actually cost the consumer more than \$10. Enforcement Policy, pt. 3, 40 Fed. Reg. 25,721, 25,722 (1975). *See also* 15 U.S.C. § 2303(d) (Supp. V 1975).

⁸⁴ 15 U.S.C. § 2301(10) (Supp. V 1975) provides:

(10) The term "remedy" means whichever of the following actions the warrantor elects:

- (A) repair,
- (B) replacement, or
- (C) refund;

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.

The term "replacement" is defined as "furnishing a new consumer product which is identical or reasonably equivalent to the warranted consumer product." *Id.* § 2301(11). The term "refund" means "refunding the actual purchase price (less reasonable depreciation based on actual use where permitted by rules of the [FTC])." *Id.* § 2301(12). The FTC has proposed a rule to be entitled "Calculation of Depreciation Deduction For Refunds Under

reasonable time.⁸⁶ A warrantor may designate an agent or representative to perform warranty services or fulfill warranty obligations, but such persons do not become cowarrantors.⁸⁷ Further, such a designation does not relieve a warrantor of his direct and primary obligation to the consumer, and it is the warrantor's duty and burden to make reasonable arrangements for the compensation of such agents and representatives.⁸⁸ Second, the warrantor may not disclaim nor limit the duration of implied warranties.⁸⁹ Third, any limitation or exclusion of consequential damages for breach of the written⁹⁰ or implied warranties must appear conspicuously "on the face" of the warranty.⁹¹ Fourth, if the warran-

Full Warranties On Consumer Products." 41 Fed. Reg. 22,099 (1976) (to be codified in 16 C.F.R. §§ 704.1-3). Due to the lack of requests for presentations respecting this proposed rule, the FTC cancelled scheduled public hearings on the matter. 41 Fed. Reg. 32,911 (1976).

⁸⁵ The term "without charge," as used in this section and § 102(c), 15 U.S.C. § 2302(c) (Supp. V 1975), is defined in 15 U.S.C. § 2304(d) (Supp. V 1975) to mean that "the warrantor may not assess the consumer for any costs the warrantor or his representatives incur in connection with the required remedy of a warranted consumer product." As to "incidental" expenses, this subsection states:

An obligation under [§ 2304(a)(1)] . . . to remedy without charge does not necessarily require the warrantor to compensate the consumer for incidental expenses; however, if any incidental expenses are incurred because the remedy is not made within a reasonable time or because the warrantor imposed an unreasonable duty upon the consumer as a condition of securing remedy, then the consumer shall be entitled to recover reasonable incidental expenses which are so incurred in any action against the warrantor.

Id. (The ellipsis in the quoted language removes a citation error in the statute.) If a warranted consumer product has utility only when installed, then installation must also be provided "without charge." Interpretations, *supra* note 1, § 700.9, 41 Fed. Reg. 34,654, 34,656 (1976). Similarly, installation of component parts must also be provided "without charge." 15 U.S.C. § 2304(a)(4) (Supp. V 1975).

⁸⁶ 15 U.S.C. § 2304(a)(1) (Supp. V 1975). The FTC may by rule define in detail the nature of the warrantor's obligations under § 2304(a). *Id.* § 2304(b)(3).

⁸⁷ *Id.* § 2307. This is typical where dealerships are involved, as in the sale of new automobiles. The manufacturer is a warrantor and the dealer is an agent or representative for the fulfillment of warranty obligations.

⁸⁸ *Id.*

⁸⁹ *Id.* § 2304(a)(2).

⁹⁰ Express warranties that are not written warranties under the Act will not fall within the ambit of this provision. See notes 43-57 and accompanying text *supra*. Theoretically, a separate exclusion or limitation of consequential damages for breaches of express warranties that are not "written warranties" under the Act could be "buried in the fine print" and still be effective under UCC § 2-719(3). However, a modern court is not likely to give effect to such a provision in light of the clear public policy against such hidden clauses.

⁹¹ 15 U.S.C. § 2304(a)(3) (Supp. V 1975); *cf.* UCC § 2-719(3) (requiring only conspicuousity). Under the Code, a contract term can be conspicuous even if it is not on the "face" of a document. See note 80 *supra*. The FTC has claimed authority under § 110 of the Act, 15 U.S.C. § 2310 (Supp. V 1975), to police against deceptive warranty practices by requiring that warrantors who make limited warranties also inform consumers of exclusions of consequential damages by a conspicuous disclosure on the face of the warranty.

tor's efforts to cure defects are unavailing after a "reasonable" number of attempts,⁹² the consumer has a right to elect a refund or a replacement⁹³ without charge.⁹⁴ Finally, the warrantor may impose only a few limited duties on the consumer as conditions of the warranty.⁹⁵ Nevertheless, a consumer's misuse of the product vitiates the full warranty.⁹⁶ A written warranty that does not meet

Enforcement Policy, pt. 7, 40 Fed. Reg. 25,721, 25,723 (1975). This conspicuity-plus requirement supplements, but does not supplant, the requirement under UCC § 2-719(3) of conscionability for exclusions of consequential damages. See 15 U.S.C. § 2311(b)(1), (2)(B) (Supp. V 1975); Enforcement Policy, pt. 7, 40 Fed. Reg. 25,721, 25,723 (1975). Furthermore, the use of an exclusion that is unenforceable will be regarded as deceptive under § 110(c) of the Act, 15 U.S.C. § 2310(c) (Supp. V 1975), or § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (Supp. V 1975). Enforcement Policy, pt. 7, 40 Fed. Reg. 25,721, 25,723 (1975).

⁹² 15 U.S.C. § 2304(a)(4) (Supp. V 1975) specifically empowers the FTC to establish rules specifying just how many attempts to cure a breach are "reasonable" with respect to various types of consumer products. See also *id.* § 2304(b)(3).

⁹³ See note 84 *supra*.

⁹⁴ 15 U.S.C. § 2304(a)(4) (Supp. V 1975) (the so-called "anti-lemon" provision). See note 85 *supra*. Although § 2304(a)(4) applies to full warranties only, the FTC could use its authority under § 2302(b)(3) to relieve, to some extent, consumers who purchase "lemons" under limited warranties. This provision authorizes the Commission to prescribe rules for the extension of the duration of limited warranties when consumers are forced to spend large amounts of time seeking repairs.

⁹⁵ 15 U.S.C. § 2304(b)(1)-(2) (Supp. V 1975). For example, the FTC has taken the position that warrantors offering full warranties on consumer products cannot follow the common practice of conditioning the effectiveness of the warranty on the consumer's return of a warranty registration card. Interpretations, *supra* note 1, § 700.7(b), 41 Fed. Reg. 34,654, 34,656 (1976). On the other hand, warranty registration cards may be offered to consumers purchasing consumer products under full warranties as a convenient and optional method of proving the date of purchase. The warrantor is obligated to inform the consumer that failure to return the card does not affect his rights under the warranty so long as he can show when the product was purchased. *Id.* § 700.7(c). Since § 104(b)(1)-(2), 15 U.S.C. § 2304(b)(1)-(2) (Supp. V 1975), does not cover limited warranties, the "limited warrantor" may require return of a registration card. "Full warrantors" may also impose obligations other than notification of defects in the product if "the warrantor has demonstrated in a rulemaking proceeding, or can demonstrate in an administrative or judicial enforcement proceeding (including private enforcement), or in an informal dispute settlement proceeding, that such a duty is reasonable." *Id.* § 2304(b)(1). Notwithstanding these provisions, a warrantor may condition refund or replacement under a full warranty on receiving the product free of liens and other encumbrances, except to the extent that the FTC by rule provides otherwise for reasons of practicality. *Id.* § 2304(b)(2).

⁹⁶ The warrantor's obligations under a full warranty are abrogated if he can show that the defect, malfunction, or failure of any warranted consumer product to conform with a written warranty, was caused by damage (not resulting from defect or malfunction) while in the possession of the consumer, or unreasonable use (including failure to provide reasonable and necessary maintenance). 15 U.S.C. § 2304(c) (Supp. V 1975). "Reasonable and necessary maintenance" means performance of "those operations (A) which the consumer reasonably can be expected to perform or have performed and (B) which are necessary to keep any consumer product performing its intended function and operating at a reasonable level of performance." *Id.* § 2301(9).

all of the foregoing requirements is a limited warranty.⁹⁷

Under the Code, buyers and sellers have the general power, subject to the provisions on unconscionability, reasonableness, and minimally adequate remedies,⁹⁸ to custom-design the remedies that will be available for breaches of warranty; they may also provide that resort to a particular remedy is to be "exclusive."⁹⁹ More specifically, the UCC allows the parties to limit the buyer's remedy to "return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts."¹⁰⁰ In contrast, subject to the "basis of the bargain" requirement, the Act elevates an "undertaking in writing . . . to refund, repair, replace, or take other remedial action"¹⁰¹ from the status of an "agreed"¹⁰² remedy to the status of a *warranty* which, if broken, gives the consumer a right to a remedy fixed by the statute.¹⁰³ Therefore, if a warrantor attempts to limit his liability for breach of warranty to repair, refund, or replacement, and the transaction is subject to the Act,

⁹⁷ *Id.* § 2303(a)(2).

⁹⁸ *See* UCC §§ 2-302, 2-718, 2-719.

⁹⁹ *Id.* §§ 2-718, 2-719(1)(a)-(b). The presumption is that the buyer's remedies are cumulative, not exclusive, unless the parties clearly express a contrary intention. *See, e.g.,* Curtis v. Murphy Elevator Co., 407 F. Supp. 940, 947-48 (E.D. Tenn. 1976).

¹⁰⁰ UCC § 2-719(1)(a).

¹⁰¹ 15 U.S.C. § 2301(6)(B) (Supp. V 1975):

¹⁰² The expression "agreed remedy" is an appropriate description of a commercial contract where the buyer and the seller actually negotiate the terms of the agreement. "Imposed remedy" is a more fitting term in the typical consumer transaction in which the seller insists on the use of his printed form contract and maintains an unbending take-it-or-leave-it attitude.

¹⁰³ If the obligation to remedy is part of a full warranty (15 U.S.C. § 2304(a)(1) (Supp. V 1975); *see* notes 82-97 and accompanying text *supra*), then the consumer's primary remedy is his right to elect either replacement or refund (15 U.S.C. § 2304(a)(4) (Supp. V 1975); *see* notes 84-86 and accompanying text *supra*). If this does not result in sufficient relief, the next step would be to use any available informal dispute resolution procedure. *See* notes 135-41 and accompanying text *infra*. When all else fails, the consumer can sue the warrantor under 15 U.S.C. § 2310(d)-(e) (Supp. V 1975). However, the consumer's state law remedies under the UCC remain intact and available at all times. *See* note 138 and accompanying text *infra*.

It has long been common for the manufacturer of "40,000-mile" tires, "36-month" batteries, and similar products to limit the consumer's remedy for a breach of warranty to a pro rata discount against the consumer's *purchase* of a replacement. Although this is not permissible under a full warranty (*see* 15 U.S.C. § 2302(a)(1), (4) (Supp. V 1975)), the Act does not specifically proscribe this practice in connection with limited warranties. Nothing in the Act imposes a duty to "remedy" (*see id.* § 2301(10)) breaches of limited warranties. But if a warrantor generally cannot condition a warranty on the tie-in purchase of a second product (*id.* § 2302(c)), there is no apparent reason why a consumer should be deprived of the warranty protection he has already paid for along with the original purchase when he declines to buy another product from the same manufacturer. A consumer should not be required to sacrifice either his warranty protection or his free choice in the marketplace. *See* notes 77-78 and accompanying text *supra*.

then the warrantor has created, albeit unintentionally, a written warranty under the Act.¹⁰⁴

The power to limit or exclude consequential damages for breach of warranty under the UCC is circumscribed only by the requirement of conscionability.¹⁰⁵ If a warrantor gives a full warranty under the Act, a requirement of conspicuity is added.¹⁰⁶ The Act does not expressly impose a similar conspicuity requirement on limitations of consequential damages in cases of limited warranties. Fortunately for consumers, the FTC may have the authority to require conspicuity in such cases.¹⁰⁷ The terms and conditions of service contracts must be "fully, clearly, and conspicuously disclose[d]" in "simple and readily understood language."¹⁰⁸ Arguably, any provision in a service contract limiting or excluding consequential damages must be conspicuously disclosed to the consumer.

D. Privity Rules

The Act significantly changes the privity rules in the less progressive jurisdictions.¹⁰⁹ Warranty obligations under the Act run to the "consumer,"¹¹⁰ a term defined in section 101(3) of the Act¹¹¹ 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 con-

¹⁰⁴ See notes 70-81 and accompanying text *supra*. When the warranty is subject to both the Act and the Code the warrantor can evidently limit his Code liability at the expense of making a written warranty under the Act.

¹⁰⁵ UCC § 2-719(3).

¹⁰⁶ 15 U.S.C. § 2304(a)(3) (Supp. V 1975). *Id.* § 2311(b)(2)(B) provides that "[n]othing in this chapter (other than sections 2308 and 2304(a)(2) and (4) of this title) shall . . . supersede any provision of State law regarding consequential damages for injury to the person or other injury." Therefore, § 2304(a)(3) does not supersede UCC § 2-719(3); it only adds the requirement of conspicuity in cases of full warranties. See Enforcement Policy, pt. 7, 40 Fed. Reg. 25,721, 25,723 (1975).

¹⁰⁷ The FTC has already taken the position that such power is an incident of its authority under 15 U.S.C. § 2310(c) (Supp. V 1975) to police against deceptive warranty practices. Enforcement Policy, pt. 7, 40 Fed. Reg. 25,721, 25,723 (1975). See note 91 *supra*.

¹⁰⁸ 15 U.S.C. § 2306(b) (Supp. V 1975). This section became effective July 4, 1975. Enforcement Policy, pt. 9, 40 Fed. Reg. 25,721, 25,723 (1975). The FTC was given—but has not yet exercised—authority to make rules governing the manner and form of such disclosures. 15 U.S.C. § 2306(a) (Supp. V 1975).

¹⁰⁹ For a discussion of state law privity rules under the UCC, see J. WHITE & R. SUMMERS, *supra* note 31, §§ 11—1 to 11—6.

¹¹⁰ See, e.g., 15 U.S.C. §§ 2302(a), 2308(a) (Supp. V 1975).

¹¹¹ *Id.* § 2301(3). The following definitional cross-references are relevant: 15 U.S.C. § 2301(1) ("consumer product"); § 2301(5) ("warrantor"); § 2301(6) ("written warranty"); § 2301(7) ("implied warranty"); § 2301(8) ("service contract"); § 2301(15) ("State" and "State law").

tract) 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).

A buyer "other than for purposes of resale" is the first purchaser at retail. This removes any question of lack of "vertical privity" between a warrantor and the first retail purchaser.¹¹² This also excludes retailers from the protection of the Act.¹¹³ Retail sellers and other "middlemen" must look only to the UCC and other applicable state law for their own warranty protection.¹¹⁴ Under the Act, warranty obligations remain in force when the first purchaser transfers the product to someone else during the warranty period. The Act does not specify that the transfer must be of any particular type, so warranty obligations probably extend to the first

¹¹² In contrast, under state law, despite a trend toward relaxation of the vertical privity requirements, especially in consumer cases (*see, e.g.*, *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Alaska 1976)), the vertical privity requirement remains problematical for warranty plaintiffs in some jurisdictions. *See, e.g.*, *Herbstman v. Eastman Kodak Co.*, 68 N.J. 1, 342 A.2d 181 (1975) (unsuccessful action for refund of purchase price of defective camera).

¹¹³ Some might argue that the use of the term "buyer" rather than the term "consumer" in 15 U.S.C. § 2301(6)(A) (Supp. V 1975) indicates that "written warranties" can run to retailers. But note that the Act is a *consumer* protection measure. It is not comprehensive and it is neither designed nor equipped to govern all aspects of mercantile sales. Also, the Act is not a response to the inadequacies of the UCC as a body of *commercial* law. The term "buyer for purposes other than resale," which is used in the language following clause (B) of § 2301(6), is more appropriate here than the term "consumer" because it is only the first purchaser at retail, not all "consumers," who can make warranties part of the "basis of the bargain" at the time of the sale. The omission of the phrase "for purposes other than resale" after the word "buyer" in § 2301(6)(A) may be a drafting error. *See also id.* § 2304(b)(4).

An alternative explanation would be that the final clause of § 2301(6) is set out to the left-hand margin so that it modifies both sub-paragraphs (A) and (B) of the definition. This construction was suggested in an informal opinion of an FTC staff member. Letter from Lawrence Kanter to William R. Kutner, June 2, 1976 (on file with the *Cornell Law Review*).

¹¹⁴ Those who buy specifically for the purpose of resale will necessarily want to buy only "merchantable" goods. *See* UCC § 2-314(2). The typical sale of a consumer product involves several potential warranty relationships: retailer-consumer, manufacturer-retailer, manufacturer-consumer, component supplier-manufacturer, and, sometimes, component supplier-consumer. The relationships of the manufacturer with his component suppliers and his retailers are governed by the UCC or other applicable state law (*see* note 17 *supra*), not the Magnuson-Moss Warranty Act. *See* note 113 *supra*. However, component suppliers, manufacturers, and retailers are all "merchants" within the meaning of UCC § 2-104(1) (*see* note 13 *supra*) and each can realistically be expected to protect himself in dealing with the others. For this reason, warranties relevant to such relationships will not be considered here. In most cases, however, each will have to consider his relationship with the first purchaser at retail (and other "consumers"). *See* text accompanying note 111 *supra*.

purchaser's transferee, whether the transfer is a gift, a gratuitous loan, a bailment for hire, or a "casual" or "isolated" sale.¹¹⁵ Any person qualifying as a third-party beneficiary of a warranty under state law,¹¹⁶ which may be quite liberal,¹¹⁷ is a covered "consumer" under the Act. Thus, the horizontal privity requirement is largely governed by state law, while the vertical privity requirement is controlled by the Act. Finally, any "other person" to whom a warrantor may choose to extend the coverage of a warranty is also included.¹¹⁸

These privity rules pertain to breaches of any written or implied warranty or service contract covered by the Act that result in economic losses or property damage; a special rule governs personal injury claims. Section 111(b)(2)(A)¹¹⁹ provides that "[n]othing in this title (other than sections 108 and 104(a)(2) and (4)) shall . . . affect the liability of, or impose liability on, any person for personal injury" As discussed earlier,¹²⁰ sections 108 and 104(a)(2) provide that: (1) if any written warranty is given, implied warranties may not be disclaimed; (2) if the written warranty is a "full" one, no time limit may be imposed on the duration of implied warranties; and (3) if the written warranty is a "limited" one, there may, under certain circumstances, be a durational limit imposed upon implied warranties. However, the relevance of section 104(a)(4) to section 111(b)(2)(A) is not obvious. Section 104(a)(4) requires a "full warrantor" who is unable to repair a defective consumer product to allow the consumer to elect a remedy.¹²¹ Section 104(b)(4) of the Act¹²² provides that "[t]he duties under sub-

¹¹⁵ Although a full warranty may not expressly restrict the rights of a transferee during its stated duration, Interpretations, *supra* note 1, § 700.6(b), 41 Fed. Reg. 34,654, 34,656 (1976), the duration of the full warranty itself can be limited to the time that the product is owned by the first purchaser or used in conjunction with another product. *Id.* § 700.6(c). This suggests that a warrantor cannot deny the transferee's rights under a full warranty when the transfer is a bailment or loan, since ownership does not change. Because the consumer may be led to believe that no proof of purchase will be required, no such proof may be required. *Id.* An example of this type of limitation is a full warranty on an automotive battery "for as long as you own your car."

¹¹⁶ See UCC § 2-313, Comment 2; § 2-318.

¹¹⁷ See *Salvador v. Atlantic Steel Boiler Co.*, 457 Pa. 24, 319 A.2d 903 (1974), *overruling* *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963). Essentially, *Salvador* transforms PA. STAT. ANN. tit. 12A, § 2-318 (Purdon 1970), which corresponds to UCC § 2-318 Alternative A, into Alternative B.

¹¹⁸ 15 U.S.C. § 2301(3) (Supp. V 1975). Thus, agreement of the parties may expand, but not contract, warranty protection.

¹¹⁹ 15 U.S.C. § 2311(b)(2)(A) (Supp. V 1975).

¹²⁰ See notes 70-81, 89 and accompanying text *supra*.

¹²¹ See notes 84-86 and accompanying text *supra*.

¹²² 15 U.S.C. § 2304(b)(4) (Supp. V 1975).

section [104(a)] extend from the warrantor to each person who is a consumer with respect to the consumer product." Evidently, in light of section 111(b)(2)(A), a violation of section 104(a)(4) that results in personal injury to anyone who is a consumer with respect to a particular consumer product, *creates a federal cause of action* under the Act for the First purchaser, his transferee, or anyone who is a third-party beneficiary of the warranty under state law or the terms of the warranty, without regard to traditional privity rules. In contrast, the first purchaser's vendee is virtually certain to be barred under state law from recovery against his vendor's warrantor for want of privity.

Distinct from the question of *to* whom a warranty runs, but equally important, is the question of *from* whom a warranty runs. Under the Act, warranty obligations run from a "warrantor,"¹²³ who is defined as "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."¹²⁴ A "supplier" is "any person engaged in the business of making a consumer product directly or indirectly available to consumers."¹²⁵ Therefore, "suppliers" includes "among others, all persons in the chain of production and distribution of a consumer product including the producer or manufacturer, component supplier, wholesaler, distributor, and retailer."¹²⁶ However, section 110(f) of the Act¹²⁷ provides that, for purposes of enforcement under the Act,¹²⁸ "only the warrantor actually making a written affirmation of fact, promise, or undertaking shall be

¹²³ See, e.g., 15 U.S.C. §§ 2302(a), 2303(a), 2304(a) (Supp. V 1975).

¹²⁴ *Id.* § 2301(5).

¹²⁵ *Id.* § 2301(4).

¹²⁶ H.R. REP. NO. 1107, 93d Cong., 2d Sess. 35 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7702, 7717.

¹²⁷ 15 U.S.C. § 2310(f) (Supp. V 1975). Interpretations, *supra* note 1, § 700.4, 41 Fed. Reg. 34,654, 34,655 (1976) provides:

Section 110(f) of the Act provides that only the supplier "actually making" a written warranty is liable for purposes of FTC and private enforcement of the Act. A supplier who does no more than distribute or sell a consumer product covered by a written warranty offered by another person or business and which identifies that person or business as the warrantor is not liable for failure of the written warranty to comply with the Act or rules thereunder. However, other actions and written and oral representations of such a supplier in connection with the offer or sale of a warranted product may obligate that supplier under the Act. Suppliers are advised to consult state law to determine those actions and representations which may make them co-warrantors, and therefore obligated under the warranty.

The matter of *oral* representations seems to be exclusively within the province of state law. See notes 44-46 and accompanying text *supra*.

¹²⁸ See 15 U.S.C. § 2310 (Supp. V 1975).

deemed to have created a written warranty" Thus a manufacturer's written warranty can be enforced by civil action under section 110 *only* against the manufacturer, not the retailer. Of course, a retailer may, in such cases, be subject to warranty liability under the Code. In contrast, in cases where a component manufacturer gives a written warranty to the first purchaser at retail, as is often the case with the tires on a new automobile, there is no bar to an action under section 110 for want of privity.¹²⁹ In such cases either the manufacturer or the retailer may also incur warranty liability under the UCC.

An implied warranty, for purposes of the Act, is one that *arises under state law* (as modified by the Act).¹³⁰ Remote sellers, such as component manufacturers, may have no implied warranty liability to consumers even when they make written warranties under the Act because implied warranties might not arise in such cases.¹³¹ On the other hand, the policy of the Act favors meaningful warranties on consumer products.¹³² In light of this clearly enunciated congressional policy, judges and legislators in the less progressive jurisdictions may be more apt to relax the strictness of traditional privity rules—at least in cases involving consumer products or consumer-buyers.

¹²⁹ Interpretations, *supra* note 1, § 700.3(d), 41 Fed. Reg. 34,654, 34,655 (1976) provides in part:

Many consumer products are covered by warranties which are neither intended for, nor enforceable by, consumers. A common example is a warranty given by a component supplier to a manufacturer of consumer products. (The manufacturer may, in turn, warrant these components to consumers.) The component supplier's warranty is generally given solely to the product manufacturer, and is neither intended to be conveyed to the consumer nor brought to the consumer's attention in connection with a sale. Such warranties [*sic*] are not subject to the Act, since a written warranty under Section 101(6) of the Act [15 U.S.C. § 2301(6)] must become "part of the basis of the bargain between a supplier and a buyer for purposes other than resale." However[,] the Act applies to a component supplier's warranty in writing which is given to the consumer. An example is a supplier's written warranty to the consumer covering a refrigerator that is sold installed in a boat or recreational vehicle. The supplier of the refrigerator relies on the boat or vehicle assembler to convey the written agreement to the consumer. In this case, the supplier's written warranty is to a consumer, and is covered by the Act.

¹³⁰ See notes 61-63 and accompanying text *supra*.

¹³¹ See, e.g., *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963) (action for wrongful death of airplane passenger not maintainable against manufacturer of plane's altimeter).

¹³² Elimination of the warrantor's power to disclaim implied warranties is evidence of this policy. See notes 74-75 and accompanying text *supra*. This is reinforced by the designation and disclosure requirements (see notes 71-73 and accompanying text *supra* & notes 133-34 and accompanying text *infra*) and the congressional statement of purposes in 15 U.S.C. § 2302(a) (Supp. V 1975).

E. *Miscellaneous Features*

The Act creates a sophisticated disclosure scheme that requires warrantors to reveal, before the consummation of a sale, the nature and limits of their obligations to the consumer.¹³³ Similar obligations are imposed on service contractors.¹³⁴ The UCC lacks an analogous requirement.

The general rule under the UCC is that, unless the Code otherwise provides, the parties have a right to go to court to enforce the terms of their bargain.¹³⁵ Under the Act, Congress has "declare[d] it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms."¹³⁶ Consumers may even be obligated to pursue informal remedies before going to court to enforce their rights under the Act.¹³⁷ Of course, the consumer may still pursue his UCC remedies in court without first resorting to any available or com-

¹³³ 15 U.S.C. § 2302(a), (b)(1) (Supp. V 1975); 16 C.F.R. §§ 701.1-702.3 (1976). The rules became effective December 31, 1976, as to products manufactured after that date. 15 U.S.C. § 2312(b) (Supp. V 1975); Interpretations, *supra* note 1, § 700.12, 41 Fed. Reg. 34,654, 34,657 (1976); 40 Fed. Reg. 60,168, 60,188 (1975), *as amended*, 41 Fed. Reg. 4,814 (1976). Section 102(a) of the Act, 15 U.S.C. § 2302(a) (Supp. V 1975), calls for disclosure "to the extent required by rules of the [FTC]." Thus, although the provisions of § 102 of the Act apply only to consumer products "actually costing the consumer more than \$5" (15 U.S.C. § 2302(e) (Supp. V 1975)), the FTC rules require disclosure only as to products actually costing the consumer more than \$15. 16 C.F.R. §§ 701.2, .3(a) (1976). The minimum cost requirements for applicability of the statute to goods sold in multiple packaging are set forth in Enforcement Policy, pt. 2, 40 Fed. Reg. 25,721, 25,722 (1975). Presumably the same rules will govern goods sold in multiple packaging for purposes of 16 C.F.R. § 701.3(a) (1976).

Under § 111(c)(1), 15 U.S.C. § 2311(c)(1) (Supp. V 1975), a state law requirement of labeling or disclosure with respect to written warranties or performance thereunder, which is not identical to the federal statute and the rules implementing it, is superseded and rendered inapplicable to written warranties governed by §§ 2302-2304. However, the FTC may grant exceptions where the state requirements give consumers greater protection and no undue burden on interstate commerce would result. *Id.* § 2311(c)(2). California has made an application for such an exception and the FTC has invited comments. 41 Fed. Reg. 28,361 (1976).

Perhaps the most esoteric FTC pronouncement in this connection is Part 11 of the Enforcement Policy, 40 Fed. Reg. 25,721, 25,723-24 (1975), relating to the use of warranty materials printed before the Act became law. This Part specifies how such warranties may be physically modified or superseded by additional materials. It may be important to a few major manufacturers.

¹³⁴ 15 U.S.C. § 2306(b) (Supp. V 1975). The FTC has not yet exercised its power under § 2306(a) to promulgate rules prescribing "the manner and form in which the terms and conditions of service contracts shall be fully, clearly, and conspicuously disclosed."

¹³⁵ UCC § 1-106(2).

¹³⁶ 15 U.S.C. § 2310(a)(1) (Supp. V 1975).

¹³⁷ *Id.* § 2310(a)(3).

pulsory informal dispute resolution procedures.¹³⁸ The FTC is given broad rulemaking power¹³⁹ and supervisory authority¹⁴⁰ in this area, and warrantors are required to disclose to consumers the nature of such procedures in advance of any contemplated sale of a consumer product.¹⁴¹

Section 110(d) of the Act¹⁴² creates a federal civil cause of action for consumers who are damaged by the failure of a warrantor, supplier, or service contractor to comply with the requirements of the Act or the terms of a written or implied warranty or service contract. Federal district courts and competent state courts have concurrent jurisdiction,¹⁴³ but it will be far more difficult to obtain federal jurisdiction.¹⁴⁴ The availability of consumer remedies is fixed by the statute and not subject to the contrary agreement of the parties.¹⁴⁵ These remedies include compensatory damages, "other legal and equitable relief,"¹⁴⁶ and possibly incidental expenses,¹⁴⁷ court costs, and attorneys' fees.¹⁴⁸ In contrast, the UCC makes no provision for court costs or attorneys' fees.¹⁴⁹ Additionally, the warrantor cannot impose restrictions on the remedies available to the disappointed or injured consumer, which represents a significant advance.¹⁵⁰

Finally, although parties are generally permitted to shape their own deals under the UCC,¹⁵¹ the Act is a regulatory law that gives the FTC broad authority to police the activities of those who offer

¹³⁸ See *id.* § 2311(b)(1). But the relative expense may make this a seldom-exercised right. The exorbitant cost of litigation today was probably a major impetus for the enactment of the Magnuson-Moss Warranty Act. See *id.* § 2310(a)(1).

¹³⁹ *Id.* § 2310(a)(2); Informal Dispute Settlement Procedures, 16 C.F.R. §§ 703.1-8 (1976) (effective July 4, 1976). This rule is not effective until May 1, 1977 insofar as it applies to equipment installed in new homes for sale. 41 Fed. Reg. 47,914 (1976).

¹⁴⁰ 15 U.S.C. § 2310(a)(4) (Supp. V 1975). The Commission *may* take action to review the operation of a warrantor's dispute procedure *sua sponte*, but *must* take action upon "written complaint filed by any interested person." *Id.*

¹⁴¹ *Id.* § 2302(a)(8); 16 C.F.R. §§ 701.3(a)(6), 702.1-3, 703.2(b)-(c) (1976).

¹⁴² 15 U.S.C. § 2310(d) (Supp. V 1975).

¹⁴³ *Id.* § 2310(d)(1)(A)-(B).

¹⁴⁴ See *id.* § 2310(d)(3).

¹⁴⁵ *Id.* §§ 2304(a)(4), 2310(d)(1)-(2); see Interpretations, *supra* note 1, § 700.8, 41 Fed. Reg. 34,654, 34,656 (1976).

¹⁴⁶ 15 U.S.C. § 2310(d)(1) (Supp. V 1975).

¹⁴⁷ *Id.* § 2304(d).

¹⁴⁸ *Id.* § 2310(d)(2).

¹⁴⁹ The Act's provision for costs and counsel fees has a double effect: it helps the disappointed or injured consumer and gives warrantors an added incentive to carry into effect Congress' announced policy favoring the establishment of informal warranty dispute resolution procedures. See note 136 and accompanying text *supra*.

¹⁵⁰ See notes 11-12 and accompanying text *supra*.

¹⁵¹ See notes 6-14 and accompanying text *supra*.

warranties on consumer products.¹⁵² Title II of the Act¹⁵³ significantly expands the powers of the Commission. The FTC's jurisdiction now embraces transactions that merely affect interstate commerce.¹⁵⁴ In addition, the Act directs the FTC to prescribe rules under some sections¹⁵⁵ and gives it discretion to establish rules under other sections.¹⁵⁶ The FTC is also authorized to promulgate model warranty clauses that warrantors may incorporate by reference.¹⁵⁷ Both the Attorney General¹⁵⁸ and the FTC are empowered¹⁵⁹ to bring suits to enjoin deceptive warranty practices¹⁶⁰

¹⁵² 15 U.S.C. § 2310(b) (Supp. V 1975) makes it a violation of the Federal Trade Commission Act § 5(a)(1), 15 U.S.C. § 45(a)(1) (Supp. V 1975), to violate Title I of the Act or rules prescribed thereunder. The penalty for each violation can be a fine of \$10,000. 15 U.S.C. § 45(m)(I)(A) (Supp. V 1975).

¹⁵³ Title II of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, §§ 201-207, 15 U.S.C. §§ 45, 46, 49, 50, 52, 56, 57a-57c, 58 (Supp. V 1975).

¹⁵⁴ 15 U.S.C. §§ 45, 46, 52, 57a (Supp. V 1975). See note 30 and accompanying text *supra*.

¹⁵⁵ 15 U.S.C. § 2302(a) (disclosure of warranty terms); § 2302(b)(1)(A) (pre-sale availability of terms); § 2310(a)(2) (minimum standards for informal dispute resolution procedures) (Supp. V 1975); Enforcement Policy, pt. 13, 40 Fed. Reg. 25,721, 25,724 (1975); see 15 U.S.C. § 2312(c) (Supp. V 1975) (one-year deadline for promulgation of rules). The FTC was also directed to "initiate" a rulemaking proceeding for warranties on used automobiles no later than January 4, 1976. 15 U.S.C. § 2309(b) (Supp. V 1975). Such a proceeding was initiated. See Disclosure and Other Regulations Concerning the Sale of Used Motor Vehicles, §§ 455.1(e)-(g), .2(f)-(g), .3, 41 Fed. Reg. 1089-90 (1976), *as corrected*, 41 Fed. Reg. 2100 (1976) (to be codified as 16 C.F.R. §§ 455.1(e)-(g), .2(f)-(g), .3). The language of this section of the Act seems to delegate to the Commission authority to create substantive rules, as necessary, to expand the Act's protection of consumers of used automobiles. The FTC has not yet indicated its construction of this apparent delegation of authority. This may be fertile ground for litigation.

¹⁵⁶ The FTC has discretionary authority to establish rules under 15 U.S.C. § 2301(12) (depreciation deductions for refunds under full warranties); § 2302(b)(1)(B) (disclosure of warranty information in advertising, labeling, point-of-sale materials, and other representations in writing); § 2302(b)(3) (extension of duration of warranties when consumer is deprived of use and enjoyment of a consumer product for excessive time due to failure of product to meet terms of warranty or failure of warrantor to perform his obligations); § 2302(d) (boilerplate warranty provisions); § 2303(c) (exemptions from statutory designation requirements); § 2304(a)(4), (b)(1), (b)(3) (standards of reasonableness for (1) time for effecting remedy under a full warranty under § 2304(a)(1); (2) maximum number of attempts to repair a defective consumer product under a full warranty before a consumer must be allowed to elect a refund or replacement under § 2304(a)(4); and (3) duties imposed upon consumers making claims for remedies under full warranties under § 2306(b)(1)); § 2304(b)(2) (elimination of liens and encumbrances where replacements or refunds are given under full warranties); § 2304(b)(3) (duties of warrantors under § 2304(a)); and § 2306(a) (disclosure of terms and conditions of service contracts) (Supp. V 1975). All FTC rulemaking under the Act must comply with the procedures specified in 15 U.S.C. § 2309(a) (Supp. V 1975). In addition, all FTC rules so created are specifically made subject to judicial review. *Id.*

¹⁵⁷ *Id.* § 2302(d).

¹⁵⁸ *Id.* § 2310(c)(1).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* § 2310(c)(2). The FTC has taken the position that it is a deceptive warranty

and to compel compliance with the Act.¹⁶¹ Finally, the FTC has power to review, either sua sponte or upon complaint, the operation of any informal dispute resolution procedures.¹⁶²

II

PLANNING WARRANTIES AND RESOLVING DISPUTES

A. *From the Warrantor's Point of View*

Many factors make it impossible to draft an omnibus warranty provision that can be used by all suppliers in all consumer transactions. First, terms that are clearly sensible for a relatively expensive and complex item, such as an automobile, may not be practical or even desirable for a simpler, more modest item, such as an electric alarm clock. Second, terms that are appropriate for inherently dangerous items may be inappropriate for other consumer products. The conduct of the other suppliers in the chain of distribution is a third factor. For instance, a retailer may be better advised to refrain from giving a written warranty and to disclaim all implied warranties because the manufacturer has already given a full written warranty. On the other hand, it may be a good business practice to offer a warranty when a competitor does. These considerations are intended only as illustrations; the list is not exhaustive.

A potential warrantor should consider these questions. First: Is the transaction subject to the Act? Only sales of consumer products affecting interstate commerce are within the scope of the Act.¹⁶³ Second: What state law is applicable to the transaction? At least

practice to lead a consumer to believe that certain terms and conditions of a sale are enforceable under the Act although they are not written warranties, such as a consumer's right to return a product within a certain time for a complete refund (without regard to whether it is defective). Interpretations, *supra* note 1, § 700.3(b)-(c), 41 Fed. Reg. 34,654, 34,655 (1976). The warrantor cannot include in his warranty any statement to the effect that his decision is final or that he alone shall determine what constitutes a defect under the agreement. *Id.* § 700.8, 41 Fed. Reg. 34,654, 34,656 (1976). Additionally, warrantors may not use express limitations or exclusions that are not enforceable. Enforcement Policy, pt. 7, 40 Fed. Reg. 25,721, 25,723 (1975).

¹⁶¹ 15 U.S.C. § 2310(c)(1) (Supp. V 1975).

¹⁶² See note 140 *supra*.

¹⁶³ See notes 18-31 and accompanying text *supra*. 15 U.S.C. §§ 2301(5) and 2310(c)(1) (Supp. V 1975) suggest that the FTC's power to police against deceptive warranty practices is limited to written and implied warranties covered by the Act. A more liberal approach might find FTC authority to police against deceptive warranty practices as soon as interstate commerce is affected. See 15 U.S.C. § 45(a)(2) (Supp. V 1975) (proscribes unfair methods of competition and unfair or deceptive acts or practices in or affecting interstate commerce).

some state law will always apply, usually the UCC.¹⁶⁴ Clearly, the possibility of choice-of-law planning should not be overlooked.¹⁶⁵ Third: Should a written warranty be given? If a written warranty is not given, the supplier can: (1) disclaim and exclude warranties to the fullest extent that the applicable version of the UCC will permit; (2) choose not to disclose in advance of the sale or thereafter the terms of any warranties and disclaimers or the nature of the warrantor's obligations thereunder; and (3) limit consumers' remedies in accordance with the relevant Code sections.¹⁶⁶ Fourth: If a written warranty is given, should a "full" or "limited" warranty be given?¹⁶⁷ If a full warranty is given, the supplier can exploit the value of advertisements boasting of "full warranties" that meet the new "federal minimum standards" for warranties. However, no limit may be imposed on the duration of implied warranties, the power to impose duties on the consumer as conditions of the warranty is severely limited, and the consumer is entitled to either a speedy and effective remedy for any breach of the warranty or a right to elect replacement or a refund.¹⁶⁸ If a limited warranty is given, the pejorative connotation many consumers associate with the term "limited" must be accepted, but it becomes possible to impose greater duties on the consumer and, under certain circumstances, to limit the duration of implied warranties.¹⁶⁹ Fifth: Should service contracts be offered in conjunction with or in lieu of written warranties? The use of a service contract alone eliminates the power to limit the duration of implied warranties,¹⁷⁰ so the only benefit to be gained by using a service contract alone is the consideration the consumer pays for the contract. However, service contracts may be used in conjunction with written warranties, and, if a service contract is combined with a limited warranty, the duration of implied warranties apparently may, under certain circum-

¹⁶⁴ See note 17 and accompanying text *supra*.

¹⁶⁵ See note 31 *supra*.

¹⁶⁶ 15 U.S.C. §§ 2302, 2308 (Supp. V 1975); UCC §§ 2-316, 2-718, 2-719.

¹⁶⁷ Either way, (1) the supplier is subject to the Act's disclosure and designation requirements; (2) implied warranties cannot be disclaimed; (3) consumers may be compelled to follow prescribed informal dispute resolution procedures before resorting to litigation under the Act; (4) limitations of consequential damages must be conspicuous (as well as conscionable); (5) the warrantor is entitled to a reasonable opportunity to cure defects in the product; and (6) product or service tie-in arrangements are generally not permitted. 15 U.S.C. §§ 2302(a),(c), 2303, 2304(a)(3), 2308(a), 2310(a)(3),(e) (Supp. V 1975); Enforcement Policy, pt. 7, 40 Fed. Reg. 25,721, 25,723 (1975).

¹⁶⁸ 15 U.S.C. §§ 2304(a)(1)-(2),(4),(b)(1)-(2), 2308(a)-(b) (Supp. V 1975).

¹⁶⁹ *Id.* §§ 2304(b)(1), 2308(b).

¹⁷⁰ *Id.* § 2308(a)(2),(b) (negative implication).

stances, be limited.¹⁷¹ Sixth: Should the warranty specify that repair, replacement, or refund of the actual purchase price be the sole and exclusive remedy? This may limit Code liability, but it usually creates a written warranty under the Act and entitles the consumer to statutorily designated remedies.¹⁷² When artfully combined with a mandatory informal dispute resolution process, a provision of this sort might help the warrantor to avoid the expense of litigation. Seventh: Is the warrantor accidentally or intentionally creating any other express warranty obligations through his advertising, packaging, or labeling?¹⁷³ Even if a carefully worded disclaimer of "other express warranties" appearing with a warrantor's disclosure of the terms of the written warranty would not offend the literal terms of the Act, it might amount to a "deceptive practice."¹⁷⁴ On the other hand, an appropriately worded merger clause in the disclosure of the terms of the written warranty and any writings memorializing the sale might be effective to negate Code liability for express warranties.¹⁷⁵ Finally, a conspicuous and simply worded provision in the pre-sale disclosure of terms, which informs the consumer that no person is authorized to make any warranties or representations on behalf of the warrantor making the disclosure, is advisable.¹⁷⁶ This may make the "basis of the bargain" requirement a more formidable obstacle for the consumer.

B. *From the Consumer's Point of View*

Attorneys representing consumers must remember that warranty is only one theory of recovery in products liability cases.¹⁷⁷ If

¹⁷¹ See notes 75 & 80 *supra*.

¹⁷² See notes 84 & 98-104 and accompanying text *supra*. Because remedies are fixed by the statute (see note 145 and accompanying text *supra*), this may be a deceptive practice. See notes 158-61 and accompanying text *supra*.

¹⁷³ See notes 51-54 and accompanying text *supra*.

¹⁷⁴ See note 160 and accompanying text *supra*. Whether it would survive scrutiny under UCC § 2-316(1) is also doubtful.

¹⁷⁵ See UCC §§ 2-202, 2-316(1). Courts should refuse to give effect to merger clauses and the parol evidence rule in consumer transactions, at least to the extent that adherence to these technical and arcane rules results in the disavowal of express warranties.

¹⁷⁶ See UCC § 2-316, Comment 2. Whether any express warranties arise between the retailer and the consumer will generally be governed by the UCC. However, if the retailer makes warranties under the Act, then he, too, may try to exclude other express warranties in this manner.

¹⁷⁷ Actions may lie for negligence, strict liability in tort, and fraud or misrepresentation, either *ex contractu* or *ex delicto*. See, e.g., *City Dodge, Inc. v. Gardner*, 232 Ga. 766, 208 S.E.2d 794 (1974). It may also be possible to bring an action under § 23 of the Consumer

a warranty action is appropriate, the Magnuson-Moss Warranty Act, differing versions of the UCC, and extra-Code state law may apply to the transaction.¹⁷⁸ The supplier may not have the right to disclaim or limit the duration of implied warranties,¹⁷⁹ and consequential damages may not have been effectively excluded.¹⁸⁰ Further, if a full warranty has been given and the warrantor is unable to effect repair after a reasonable number of attempts, then the consumer is entitled to elect either a replacement or a refund.¹⁸¹ The consumer is entitled to avail himself of any informal dispute resolution process established by the warrantor; under certain circumstances the consumer may be compelled to resort to such a procedure before bringing a civil action under the Act to enforce his rights under the Act.¹⁸² When there is no informal procedure, or when it has been exhausted, the consumer may have a cause of action under the Act for damages, other legal and equitable relief, and possibly incidental expenses, court costs, and attorneys' fees.¹⁸³ The consumer is always entitled to resort to his remedies under applicable state law—even when a compulsory informal dispute resolution procedure has been established.¹⁸⁴

CONCLUSION

Under the Magnuson-Moss Warranty Act, manufacturers and sellers of consumer products are not required to give warranties. However, any supplier of consumer products who gives a "written warranty" to a consumer or who enters into a "service contract" with a consumer within ninety days from the time of sale loses the power to disclaim implied warranties arising under state law. In addition, warrantors generally must designate their warranties as either "full" or "limited" and they must disclose to the consumer

Product Safety Act, 15 U.S.C. § 2072 (Supp. V 1975). Consumers often rest their right to recover on several theories. *See, e.g.*, *Shotkoski v. Standard Chem. Mfg. Co.*, 195 Neb. 22, 237 N.W.2d 92 (1975) (express and implied warranties, negligence, and strict liability in tort). However, an action for breach of warranty may be necessary for recovery of the purchase price (UCC § 2-711(1)), recovery of damages for economic loss of the bargain (UCC § 2-714), and for incidental and consequential losses (UCC § 2-715). The buyer's right to deduct his damages for breach of warranty from the price (UCC § 2-717) is of real practical importance.

¹⁷⁸ See notes 17-31 and accompanying text *supra*.

¹⁷⁹ See notes 74-75 and accompanying text *supra*.

¹⁸⁰ See notes 90-91 and accompanying text *supra*.

¹⁸¹ See notes 82-86, 92-94 and accompanying text *supra*.

¹⁸² See notes 135-37 and accompanying text *supra*.

¹⁸³ See notes 142-50 and accompanying text *supra*.

¹⁸⁴ See note 138 and accompanying text *supra*.

—prior to the sale—the terms and conditions of such warranties. Full warranties give consumers many advantages, the most significant being a right, not subject to the contrary “agreement” of the parties, to elect a refund or a replacement when the warrantor is unable to repair a defective consumer product within a reasonable time. Congress has encouraged the creation of informal dispute settlement mechanisms which, if established by warrantors, should simplify and reduce the cost of the process of enforcing warranty obligations. Finally, the FTC has been given broad power to protect consumers from deceptive warranty practices.

The Magnuson-Moss Warranty Act is not a comprehensive measure; it supplements, but does not supplant, the Uniform Commercial Code. The interdependence of federal and state law in this area injects complexity and a lack of uniformity into the picture. This makes the planning of sellers’ warranty liabilities more difficult and more expensive.

It remains to be seen whether suppliers of consumer products will offer full warranties, whether the FTC will zealously exercise its enforcement powers to the fullest extent contemplated by the Act, and whether the Act will ultimately be regarded as a boon or a bane to the cause of consumer protection.

William R. Kutner