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The Card Warranty and Consumer Sales

THE CARD WARRANTY AND CONSUMER SALES

The recent increase in legislative and professional interest in consumer protection has not lacked a corresponding increase in articles by educators, lawyers and student commentators.[1] The field of warranty liability, especially in the wake of decisions such as *Henningson v. Bloomfield Motors, Incorporated*[2] and the cases that followed,[3] has been thoroughly analyzed. Yet, there remains an aspect of warranty law which has been largely ignored, but with which the general consumer[4] has his most frequent and direct contact. This concerns the "card warranty"[5] and its legal and psychological impact upon the consumer's ability to recover for damage caused by defective products. The term "card warranty" refers to the printed "guarantee" or "warranty" (typically amounting to a disclaimer of liability)[6] packaged with most manufactured household articles and appliances sold on the consumer market.

The impact and importance of the card warranty is not confined to its strictly "legal" consequences, but also involves the economic and psychologcial objectives of the manufacturer. However, while the card warranty serves these other purposes of the manufacturer, it is primarily a warranty, purporting to extend protection to the buyer of the warranted product.

Historically, an action for breach of warranty against the seller has been the buyer's most effective remedy for injuries caused by defective products.[7] Today, in many instances the buyer may more profitably resort to the doctrine of strict liability.[8] In certain cases, a cause of action for fraud may be the buyer's most effective medium of recovery.[9]

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1. The articles and comments cited throughout this note are just a few of the examples from recent years.

2. 32 N.J. 358, 161 A.2d 69 (1960). This landmark case held some particularly restrictive examples of warranty disclaimers invalid as unconscionable and contrary to public policy.

3. State Farm Mut. Auto Ins. Co. v. Anderson-Weber, Inc., 252 Iowa 1289, 110 N.W.2d 449 (1961); Pabon v. Hackensack Auto Sales, Inc., 63 N.J. Super. 476, 164 A.2d 773 (Super. Ct. 1960).

4. The words "consumer" and "buyer" will, in this note, be treated as synonymous in referring to the purchaser of consumer goods, as distinguished from the commercial or business buyer.

5. Since this type of warranty has nowhere been named or classified, the term "card warranty" has been assigned by the writer.

6. *E.g.*, Rasmus v. A.D. Smith Corp., 158 F.Supp. 70 (W.D. Iowa 1958).

7. *See generally* Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699 (1936).

8. *See* Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960).

9. For example, privity of contract is not required in the fraud action; misrepresentations of opinion are not usually construed to be warranties although they may

Nevertheless there remain a great number of situations in which the buyer must resort to warranty theory to obtain optimum relief. For example, the doctrine of strict liability may not encompass all of the elements of damage which are caused by a defective product;[10] or the buyer may wish to take advantage of the longer statute of limitations by framing his complaint in warranty theory.[11] Also, warranty theory may often provide a more desirable remedy than fraud theory since warranty recovery does not require that the buyer establish the seller's knowledge of the defect.[12]

This note attempts to classify the various major types of card warranties. Suggestions are made as to the manufacturer's intent in issuing the card warranty. Also, the legal and economic effect of the card warranty's function as a disclaimer are explored.

I. THE CARD WARRANTY

Although the card warranty serves several purposes, it is primarily a limited express warranty. A warranty is usually defined as:

> A statement or representation made by the seller of goods contemporaneously with and as a part of, the contract of sale, although collateral to the express object of it, having reference to the character, quality, or title of the goods, and by which he promises or undertakes to insure that certain facts are, or shall be, as he represents them.[13]

Warranties are either express (an actual representation made orally or in writing, by the seller) or implied (arising by operation of law). While warranty actions originally sounded in tort, the warranty is now enforced in the form of an action on the contract of which it is a collateral part.[14] Recovery premised upon a breach of warranty, then, does not depend upon the subjective fault of the seller or manufacturer, but is

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give rise to a cause of action under fraud theory. *See generally* 1 FRUMMER & FRIEDMAN, PRODUCTS LIABILITY (1965).

10. Damages for economic loss and property damage to the product itself, as distinguished from personal injuries and other property damage, are often not includable under the strict tort theory. *See* Seely v. White Motor Co., 45 Cal. Rptr. 17, 403 P.2d 145 (1965); *See generally* Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960).

11. *E.g.*, George v. Douglas Aircraft Co., 332 F.2d 78 (2d Cir. 1964). § 2-725 of the Uniform Commercial Code [hereinafter cited as UCC] provides a four year statute on causes of action for breach of contract, while the typical tort statute runs from only one to two years. *See* Annot. 4 A.L.R.3d 821 (1965).

12. *See* 1 FRUMMER & FRIEDMAN, PRODUCTS LIABILITY § 16.01(1) at 350.1-360 (1965).

13. 77 C.J.S. *Sales* §301 (1952), quoted with approval in Mitchell v. Rudasill, 332 S.W.2d 91, 94-95 (Mo. App. 1960).

14. *See generally* Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699 (1936).

based upon his absolute liability for a breach of an express or implied promise.[15] Therefore, while a buyer suing for breach of warranty generally need not prove the seller's or manufacturer's negligence, he must contend with the various problems of contract and sales law.[16]

Card warranties, as a species of the express warranty, present additional problems peculiar to themselves. The vast majority of, if not all, card warranties are not only express warranties but are also attempted disclaimers of warranty[17] and/or attempted limitations of liability for damage caused by defective products. The card warranty operates as a disclaimer by enumerating certain express obligations which the manufacturer promises to undertake while disclaiming the implied warranties which would otherwise arise upon purchase,[18] as well as expressly limiting the extent of the manufacturer's liability for the consequences of damage.

II. Types of Card Warranties

While card warranties vary in organization and structure they generally appear in one of two forms. Into the first category may be grouped the type of card warranty requiring affirmative conduct on the part of the buyer to effectuate its terms. The terms of the card direct the buyer to sign and return the warranty by mail. Typically, the warranty is printed on the back of a postage pre-paid card, addressed to the manufacturer's offices.

This type of card warranty is commonly used by the manufacturer as a vehicle through which to gather a wide variety of market and distribution information. Often, for example, the cards are stamped with a "registration" number corresponding to a number on the prdouct packing carton which number also appears in the manufacturer's files. The card advises the purchaser to "register" his purchase by mailing the card to the manufacturer. When the manufacturer receives the card he is able, by checking the registration number against his files, to obtain an overall picture of the distribution pattern of his product, as well as to trace the path of any particular item through the distributive channels. Usually,

15. 1 S. Williston, Sales § 237 (1948); UCC § 2-313, comment 1; Douglas v. W. C. Mallison & Son, 265 N.C. 362, 144 S.E.2d 139 (1965).

16. The problems of privity, consideration for the warranty contract, disclaimers and limitations of manufacturer's liability are discussed in parts II and III of this note. *See also* Prosser, *The Assault Upon the Citadel*, 69 Yale L.J. 1099 (1960); Comment, *The Contractual Aspect of Consumer Protections. Recent Developments in the Law of Sales Warranties*, 64 Mich. L. Rev. 1430 (1966).

17. Many disclaimers are couched in the form of limited and exclusive express warranties. Rasmus v. A. D. Smith Corp., 158 F.Supp. 70 (W.D. Iowa 1958).

18. The mere making of an express warranty, however detailed, does not negate implied warranties except to the extent that it is inconsistent with them. Gottsdanker v. Cutter Laboratories, 182 Cal.App. 2d 602, 6 Cal. Rptr. 320 (1960).

the "mail-in" type of card warranty also contains fill-in or check-off blanks requesting consumer and market information. This information aids the manufacturer in designing, distributing and advertising his product to fit the class of consumers who have most often purchased his product in the past. The questions posed to the consumer may include requests for the age and marital status of the buyer; the purpose (whether for home or commercial use etc.) for which the product was purchased; the motivating force which prompted the consumer's purchase (advertisement in a magazine or on television, seeing the product on the store shelf etc.) and many other market information questions.[19]

The second major type of card warranty also is usually found in the form of a printed card packaged with the manufacturer's product. This second type, however, does not require any affirmative act on the part of the consumer to effectuate its provisions. The buyer need not sign or mail the warranty card.[20] The card is merely a statement by the manufacturer, often interspaced with advertising phrases and claims concerning the product's effectiveness or beauty, of the manufacturer's "guarantee" or "warranty" of the product. This second type may contain many or all of the same warranty representations and disclaimers as the first type. This warranty, as is the case with the "mail-in" type, usually extends to the purchaser only a "repair or replacement" offer (usually at the manufacturer's option) if the product proves defective in the course of normal use.

A number of important questions involving the use of card warranties are raised by the consumer's action in response to the card warranty. Does the consumer gain or lose in terms of legal protection by signing a card warranty? How may the consumer's conduct in signing or not signing the card warranty effect the manufacturer's liability under the implied warranties imposed by the Uniform Sales Act[21] or the Uniform Commercial Code?[22] And finally, to what extent does the manner in which the card warranty is, or is not, given effect by the courts reflect a valid judgment as to the ability of the consumer to protect himself in a modern era of mass consumer merchandising? But the basic question in

19. The informational requests vary widely according to the peculiarties of the product to which the warranty is attached and the interests of the manufacturer. Those listed in the text of the note are, however, common to most "mail-in" type card warranties.

20. The buyer is usually directed to save the warranty card and to present it along with the product when he makes a claim for repair or replacement.

21. The Uniform Sales Act [hereinafter cited as USA] was drafted in 1906 and was once the law in thirty jurisdictions. *See* E. FARNSWORTH & J. HONNOLD, COMMERCIAL LAW 5 n.6 (1965). The USA has today been largely replaced by the UCC.

22. The UCC sections dealing with sales warranties are §§2-312 to -318 and 2-715, -718 and -719.

relation to the card warranty is whether the warranty is legally binding at all upon the parties to the sales transaction.

III. Validity of the Card Warranty

Since their legal validity and effectiveness may depend upon somewhat different factors, the two major types of card warranties—the "mail-in" and the "non-mail-in" types—will be discussed separately. However, statements relating to issues of the validity of disclaimer clauses and limitations of liability may be understood as common to both types.[23]

The "Mail-in" Card Warranty

The major obstacle to the validity and enforceability of the card warranty is the problem of past consideration. A warranty, even if it is an integral part of the sale contract, is of itself a contract.[24] Since the warranty is an independent collateral contract[25] it must be supported by consideration.[26] Usually the sales warranty is discussed and agreed upon at the time the sale is transacted,[27] is established by the custom and usage of trade,[28] or is implied by law.[29] In these instances the consideration problem is solved because the warranty contract is supported by the price agreed to be paid for the goods comprising the subject matter of the sale.[30] However, when the warranty is given after the completion of the sale, the consideration which usually supports the warranty has been exhausted by the sale of the goods without the warranty. Hence, there is no consideration to support this new element.[31] New consideration must be found to support a warranty that is not a part of the original transaction.[32]

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23. These are issues common to all warranties, assuming first that the warranty's legal validity has been established.

24. While a warranty is a concomitant part of a contract of sale, it is also a collateral, self-existing contract. M'Farland v. Newman, 9 Watts (Pa.) 55, 34 Am. Dec. 497 (1839); *See generally* 46 Am. Jur. *Sales* §299 (1943).

25. W & S Job v. Heidritter, 255 F.311 (2d Cir. 1918) (although the warranty contract is said to be collateral to the sale contract). M'Farland v. Newman, 9 Watts (Pa.) 55, 34 Am. Dec. 497 (1839).

26. W & S Job v. Heidritter, 255 F. 311 (2d Cir. 1918).

27. Express warranties, under the UCC are supposed to rest upon the "dickered" aspects of each bargain. UCC §2-313, comment 1.

28. Barnard v. Kellogg, 10 Wall. (U.S.) 383 (1870); Boardman v. Spooner, 13 Allen (Mass.) 353, 90 Am. Dec. 196 (1865). The Uniform Sales Act provides that an implied warranty or condition as to the quality or fitness for a particular purpose may be annexed by the usage of trade, USA §15 (5).

29. *See, e.g.*, UCC §§2-314, -315.

30. Standard Cable Co. v. Denver Elect. Co., 76 F. 422 (3d Cir. 1896); *See also* 1 S. Williston Sales §211 (1948).

31. *Id. See also* Summers v. Vaughan, 35 Ind. 323, 9 Am. Rep. 741 (1871); White v. Oakes, 88 Me. 367, 34 A. 175 (1896); *See generally* 46 Am. Jur. *Sales* §300 (1943).

32. Similarly, where a warranty offer has lapsed due to a buyer's failure to comply with offered terms (such as signing and mailing in the case of the card warranty), such

This method of presentation of the warranty—as an element apart from the contract for the sale of the goods—raises two important questions. First, is the card warranty actually issued after the consumation of the sale transaction or is it, rather, an integral part of that sale? Second, if the card warranty is, in fact, a latecomer to the sale transaction, is there anything inherent in the card warranty situation which may serve as the consideration necessary to support the warranty?

1. Card warranty as part of the sale contract

The card warranty is usually enclosed in the sealed product package. Accordingly, the buyer may not notice an enclosed warranty card until he opens the package after he has made the purchase. In fact, in the case of gifts or products not purchased for immediate use, the warranty may not come to the attention of the ultimate user for several weeks after the purchase. In view of these factors it may appear that the card warranty is a transaction distinct from the sale. However, a strong argument may be advanced in favor of the opposite conclusion—especially in cases arising under the Uniform Commercial Code.

Early case law required that a warranty, even though a collateral contract,[33] form a part of the sale transaction.[34] The Uniform Sales Act adopted this view[35] as well as the requirement that the warranty, in order to be effective, must have constituted at least a portion of the inducement for the sale.[36] Accordingly, the USA defined a warranty as:

> Any affirmation of fact or any promise by the seller relating to the goods . . . if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and the buyer purchases the goods relying thereon.[37]

Under the USA, therefore, if the buyer had no knowledge of the warranty at the time the sale was transacted, such warranty was of no legal effect unless supported by new consideration.[38]

The burden of establishing that a buyer had, in fact, relied upon the seller's representations rested on the buyer.[39] In practice, however, the

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warranty cannot be renewed without new consideration being given. Walters v. Akers, 31 Ky. L. Reptr. 259, 101 S.W. 1179 (Ky. Ct. App. 1907).

33. Gay Oil Co. v. Roach, 93 Ark. 454, 125 S.W. 122 (1910)

34. Crouch v. Parker, 188 Ind. 660, 125 N.E. 453 (1919); Hexter v. Bast, 125 Pa. 52, 17 A. 252 (1889).

35. USA §12.

36. *Id.*

37. *Id.*

38. Slide Mines v. Denver Equip. Co., 112 Colo. 285, 148 P.2d 1009 (1949); Kraig v. Benjamin, 111 Conn. 297, 149 A. 687 (1930).

39. Mitchell v. Pinkneg, 127 Iowa 696, 104 N.W. 288 (1905); Shley v. Zalis, 172 Md. 336, 191 A. 563 (1937); *see generally* 1 S. WILLISTON, SALES §207 at 534-35 (1948).

buyer was able to sustain his burden if he showed that the seller's representations were such as would naturally induce a purchase, and that the buyer did, in fact, purchase the goods concerning which the representations had been made.[40]

The UCC, in contrast to the USA, requires only that the warranty statement be part of the "basis of the bargain" in order to be effective.[41] By not requiring the buyer to demonstrate reliance on the warranty statement, the drafters of the Code may have intended to shift to the seller the burden of showing that the affirmation or promise was not a part of the sales agreement.[42] Thus, the "basis of the bargain" provision of the UCC[43] which was probably intended to aid the buyer in establishing his warranty[44] may, in the case of the card warranty, be of more aid to the manufacturer or seller in establishing a disclaimer or limitation of liability.[45] In fact, the shift of the burden, charging the seller to show that the warranty was not a part of the sale, may in effect, create a presumption that the warranty—with its accompanying disclaimer—is a part of the sales agreement.[46] In addition, UCC §2-313, comment 7, states that:

> The precise time when words of description or affirmation are made . . . [is] not material. The sole question is whether the language . . . [is] fairly to be regarded as a part of the contract.[47]

The comment further states that this warranty will become a "modification" and does not require further consideration "if it is otherwise reasonable."[48]

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40. *See* 1 S. WILLISTON, SALES § 207 at 534 (1948).

41. "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." UCC §2-313(1)(a).

42. [N]o particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations once made, out of the agreement requires clear affirmative proof.

UCC §2-313, comment 3.

43. UCC §2-313(1)(a).

44. *See* UCC §2-313, comment 3.

45. *See* examples in Appendix.

46. *But see* Joseph v. Sears Roebuck & Co., 224 S.C. 105, 77 S.E.2d 583 (1955), where the court held that the disclaimer portion of a card warranty would have to be brought to the attention of the buyer at the time the sale is made in order to be effective.

47. UCC §2-313, comment 7.

48. *Id.* This provision is to be read in connection with UCC §2-209. Comment 1 to that section states:

> This section seeks to protect and make effective all necessary and desireable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments.

But this concept still must be squared with the requirement that the warranty be made as part of the "basis of the bargain." *See* note 59 *infra* and accompanying text.

However, even if this argument tends to establish an effective warranty, it may be ineffective in establishing the validity of the disclaimer contained in the card warranty. The Code requires that disclaimers of the warranty of merchantability—the buyer's primary source of protection—must be conspicuous and mention merchantability.[49] This language could be interpreted to mean that the disclaimer must be conspicuous at the time of the sale.[50] If this interpretation is valid, the warranty language may be enforceable while the disclaimer portions of the card warranty may be ineffectual.

Arguably, a card warranty may be part of the "basis of the bargain" even if it is not referred to or seen by the buyer prior to the completion of the sale. Since most home appliance sales today involve a card warranty, the consumer may reasonably be presumed to expect a card warranty to be included within the package containing his merchandise.[51] Therefore, it may well be that the card warranty, by force of custom and usage, has become a part of the contract of sale—part of what the consumer is buying —when the purchase involves a product normally the subject of a card warranty.[52]

Warranty cards themselves often contain advertising phrases along with their warranty provisions.[53] In addition, the retailer of the product may display the card warranty attached to the product as it stands on the shelves—the word "guarantee" or "warranty" conspicuous in bold type across the card.[54] In such situations the other side of the consideration argument may be present. Since this advertising is presumably aimed at effecting the sale of the product, this warranty may be shown to have been a part of what the consumer "bought" and, hence, a part of the "basis of the bargain" under the UCC. If the card warranty is part of the basis of the original bargain, the fact that the buyer may later be required to perform some affirmative act in order to effectuate the warranty (sign and mail the warranty card to the manufacturer) should have no bearing on the warranty's validity.[55]

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49. UCC §2-316(2).

50. *See* Joseph v. Sears Roebuck & Co., 224 S.C. 105, 77 S.E.2d 583 (1955).

51. When a consumer purchases a closed container or package, he has purchased everything which might reasonably be expected to be inside. *See* Cooper v. Commonwealth, 110 Ky. 123, 60 S.W. 938 (1901). *See generally* R. BROWN, THE LAW OF PERSONAL PROPERTY, §10 at 22 (2d ed. 1955).

52. *See generally* 46 AM. JUR. *Sales* §304 (1943). The "precise time when words of description or affirmations are made or samples shown is not material." UCC §2-313, comment 7.

53. *See* examples in Appendix.

54. *Id.*

55. Robinson v. Berkey, 100 Iowa 136, 69 N.W. 434 (1896); Russell v. Murdock, 79 Iowa 101, 44 N.W. 237 (1890).

2. Consideration for the card warranty

Even assuming that the card warranty is *not* part of the "basis of the bargain," there remains the possibility that some consideration may be found to validate the warranty as a separate contract. The usual card warranty is, as previously stated, a disclaimer and an attempted limitation of liability, as well as a limited express warranty.[56] In assenting to the disclaimer, the buyer may be said to be giving up something at the time of purchase—his right to the warranties which would otherwise be implied by law. In exchange for the surrender of these warranties, the buyer receives, by virtue of the express warranty contained on the card, privity of contract with the manufacturer. Although this exchange is easier to justify in jurisdictions which do not recognize the strict liability theory and in which the privity requirement remains as a bar, the consideration should be effective even in those jurisdictions which have done away with the privity requirement. In these jurisdictions the buyer will still receive something he would not otherwise have—the ability to sue in warranty. The privity requirement is usually not bypassed in assumpsit actions.[57] Therefore, the card warranty provides the buyer with a better opportunity to select his best avenue of recovery.[58] In certain situations, the buyer's ability to adopt a warranty theory rather than a tort theory may prove to be a valuable asset. This can best be illustrated by examination of the situation in California, often considered the leading exponent of the strict tort theory. There, the lifting of the privity requirement is limited to actions for harm to persons or property and is not available where recovery is sought for some type of purely economic loss.[59] Thus, if the buyer's loss involves the price of the product, loss of earnings, loss of profits or other damage to business property caused by the defective product, the buyer must resort to his remedy in warranty or some cause of action other than tort. Since the card warranty buyer has been vested with privity by virtue of the card warranty contract, he is free to pursue his best remedy.

However, the drawback inherent in this use of the card warranty by the purchaser is the fact that the card warranty is also a disclaimer. The buyer may be placed into the awkward position of pleading the card warranty in order to establish privity, and then of attempting to avoid the warranty's restrictive terms in order to escape the limitations placed on the manufacturer's liability. This dilemma is, however, obviated to the

56. *See* note 17 *supra* and accompanying text.

57. *See* Ford Motor Co. v. Lonon, 398 S.W.2d 240 (Tenn. 1966). *See generally* Prosser, *The Assaut Upon the Citadel,* 69 YALE L. J. 1099 (1960).

58. *See* note 10 *supra* and accompanying text for the relative advantages of the warranty action as against tort or fraud theory in particular cases.

59. Seely v. White Motor Co., 45 Cal. Rptr. 17, 403 P.2d 145 (1965).

extent that the warranty's disclaiming terms may be held "unconscionable"[60] or otherwise invalidated.

The "Non-Mail-in" Card Warranty

The "non-mail-in" warranty raises several problems in addition to those presented by the "mail-in" type. When the consumer discovers a warranty of this type within the product package, it is less likely that the warranty can truly be said to be part of the "basis of the bargain." UCC §2-209(1) provides that even after a contract has been entered into, it may be modified by agreement of the parties, even though no additional consideration passes between them. However, this is probably not to suggest that a warranty may arise in this manner. Section 2-209(1) must be reconciled with the requirement that warranties be part of the "basis of the bargain."[61] Since the "non-mail-in" card warranty is not usually called to the attention of the prospective buyer, and often is enclosed inside a sealed package making thorough inspection an impossibility, it is difficult to contend that this warranty is a part of the basic sale contract.[62] There remains, however, the argument that this type of warranty has, by custom and usage, become a part of the contract of sale.[63]

Even if the "non-mail-in" card warranty is not a part of the "basis of the bargain," its warranty provisions may have some legal significance in view of the advertising representations such card warranties often contain.[64] Although this warranty may not be discovered until after the sale is made, if the buyer relies on the advertising representations contained in the warranty material and is caused injury because the representations are untrue, the buyer may have a cause of action in the tort theory of misrepresentation.[65] This is precisely what occurred in the case of *Greenman v. Yuba Power Products, Incorporated.*[66] In the *Greenman* case the untrue representation was contained in a brochure packaged with the product purchased, rather than in the card warranty itself.[67] The

60. *See* part VI *infra* for discussion of the card warranty's effectiveness as a disclaimer.

61. UCC §2-313(1)(a).

62. The buyer is not, of course, deprived of his ability to rely on the warranty because of failure to inspect if the defects are such that they would not be revealed by inspection. McCabe v. L.K. Ligget Drug Co., 330 Mass. 177, 112 N.E.2d 254 (1953) (a case involving a defective coffeemaker).

63. *See* note 53 *supra* and accompanying text for the analogous argument in relation to the "mail-in" type card warranty.

64. *See* examples in Appendix.

65. *See* W. PROSSER, TORTS 729 (3d ed. 1963).

66. 59 Cal. App. 2d 67, 377 P.2d 897 (1963).

67. It is suggested that in legal effect and, to a large extent, as to manufacurer's intention in issuance, such brochures and the "non-mail-in" type of card warranty are very similar. In fact many card warranties are presented as part of a brochure giving

court allowed recovery from the manufacturer based upon the buyer's reliance on the brochure's assurances that the power tool that he had purchased was "rugged." The buyer was injured when inadequately fastened set-screws in the tool vibrated loose during the normal use of the power tool.[68]

As illustrated by the *Greenman* case, consumers have had some success in asserting the card warranty. However, manufacturers, as we shall see, have not been as successful in asserting the disclaimer provisions of the card warranty in similar cases.[69]

IV. Manufacturer's Purposes

While the card warranty is a warranty and disclaimer on its face, it is used for a great deal more. The use of the card warranty as an information gathering medium has already been discussed[70] and other possible uses have been alluded to in the text. Because of their importance —these purposes may be the main objective of the issuance of the card warranty—they deserve a more detailed discussion.

The Card Warranty as Advertisement

The disclaimer provisions and other material contained in the card warranty are directed at several objectives and it is important to view the card warranty with this in mind. One of the functions which the card warranty performs is that of advertising the product to which the warranty is attached.[71] The warranty card and the booklet or brochure to which it may be attached,[72] usually are intended to inspire the confidence of the potential buyer.[73]

A card warranty may seem, to the average consumer, a readily visible indication that the manufacturer will "stand behind" his product. However, the "guarantee" that the consumer notices attached to the product is probably an attempt to divest him of some protection.

> Because consumers are, for the most part, unaware that a seller would be under warranty obligations notwithstanding his vol-

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operating instructions and advertising the product purchased as well as the other products manufactured by the company.

68. *See also* 2 Restatement (Second) Torts §402A (1965).

69. *See* Joseph v. Sears Roebuck & Co., 244 S.C. 105, 77 S.E.2d 583 (1955).

70. *See* notes 19-22 *supra* and accompanying text.

71. *See* examples in Appendix.

72. Card warranties are often found as a detachable part of brochures and instruction booklets packaged with the various products.

73. This factor may be important in establishing the "reliance" necessary to the effectuation of a valid warranty. *See* UCC §2-313, comment 3.

untary guarantees, they are reassured and comforted by a provision which may in fact strip them of protection.[74]

Since the average buyer of consumer goods[75] is generally without the legal knowledge or assistance necessary to appreciate the import and effect of the wording of the card warranty, he may not be aware of what he really receives or more importantly, what he gives up—when he signs and returns a card warranty to the manufacturer.

The Card Warranty as a Disclaimer

The actual disclaimer portions of the warranty card, as distinguished from the advertising and the warranty language, function on two levels—as a psychological deterrent and as a "legal" disclaimer.

1. The card warranty as a psychological disclaimer

The disclaiming language of the card warranty may act as a discouragement to spurious claims which might be brought by consumers searching for the "deep pocket."[76] For this reason many card warranties contain rather restrictive time limitations, as well as extreme limitations on the extent of the manufacturer's liability. The card may state, for example, that the warranty period shall last for only ninety days or perhaps six months.[77] The fact that this limitation may conflict with the UCC or with another statutory standard is not important. In many situations the manufacturer may never intend to plead the time period should litigation actually arise, it being sufficient that some potential claims are averted by the fact that the buyer believes that his warranty has "run out."

With the same preventive objective the card warranty may also impose other conditions such as requiring that the consumer bring or mail the product or defective part to the manufacturer's designated service office and that the consumer pay for any mailing or labor costs. Under this type of provision, the manufacturer assumes responsibility only for the replacement value of the needed parts.[78]

Many of these provisions entail such expenditures of time and trouble that the consumer may not attempt to enforce a minor claim. This is part of the economic "loss" to consumers that is rarely accounted for or

74. Comment, *Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318, 329 (1964).

75. The UCC defines "consumer goods" as goods used or bought primarily for personal, family or household purposes. UCC §9-109(1).

76. 1 A. CORBIN, CONTRACTS §128 (Supp. 1961).

77. Some card warranties state that they take effect at the date of signing and mailing by the buyer. Others take effect at the "date of purchase," and therefore are usually required to be stamped or signed by the retail dealer.

78. *See* examples in Appendix.

recovered, and which gives rise to the outcry for governmental supervision of consumer marketing practices.[79] Tremendous sums are ultimately involved in these and other consumer sales practices,[80] even though individual losses may be relatively small. When, for example, the consumer looks to his warranty upon discovering that his newly purchased product is no longer functioning properly, he may see that his ninety day warranty has run its course, even though he has actually used the product for a relatively few hours. In any event, the consumer will note that the warranty is limited to "repair and replacement" of certain parts, often with the requirement that the product be repaired only by certain qualified persons at designated service centers.[81] Lacking both the time and the proclivity to mount an argument with either the store where the product was purchased or the service center where he is to have it repaired, the average consumer may be more likely to put the entire problem out of his mind rather than to go to the expense and time of seeking a legal remedy.

Herein lies at least one of the important uses of the card warranty. It functions as what might be termed an economic or quasi-legal disclaimer or limitation of liability. This may prevent the assertion of thousands of petty (and perhaps some fairly substantial) claims against the manufacturer which claims might, in the aggregate, cause him immense expenditures of labor, time and money if he were to undertake to correct them all.

2. The card warranty as a legal disclaimer

The second level on which the disclaimer portion of the card warranty functions, is as a protection against major liability claims by injured buyers.

Ordinarily, for simple business reasons, a manufacturer has no objection to repairing or replacing those of his products which are defective. This is merely good business practice in that it creates good will toward the manufacturer and his product. Furthermore, since the size of such loss is, after a period of production and sale of the product, statistically predictable, these losses can be taken into account in the price of the product and be passed on to the consumer.[82] Hence, most card warranties commit the manufacturer to "repair and replacement" of parts.[83]

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79. *See* Barber, *Government and the Consumer,* 64 MICH. L. REV. 1203 (1966).

80. Consumer expenditures today account for almost two-thirds of the $700 billion in goods and services produced annually. ECONOMIC REPORT OF THE PRESIDENT, 209 (table c-14) (Jan. 1967).

81. *See* examples in Appendix.

82. Keeton, *Products Liability—Some Observations About Allocation of Risks,* 64 MICH. L. REV. 1329 (1966).

83. *See* examples in Appendix.

The costs which result from successful suits for consequential damages against the manufacturer are not so easily taken into account. The amounts of such recovery may vary widely and are statistically unpredictable.[84] Accordingly, it may be impossible to include these losses in the price. It is also more difficult to pass these costs to the consumer in a competitive market.[85] For these reasons, the card warranty is generally limited to "repair and replacement" liability, and responsibility for consequential damages is disclaimed.

V. Limitations on the Card Warranty Disclaimer

While the courts have recognized that it is extremely difficult, if not impossible, for the modern consumer to make intelligent judgments about the safety or suitability of products in his day-to-day purchases (hence the doctrine of strict liability in tort),[86] the consumer is generally assumed competent to make an intelligent judgment as to whether or not he should accept the product subject to the terms demanded.[87] Several recent decisions have checked the more flagrant abuses of warranty disclaimers and limitations of liability.[88] However, it is still probably true that consumers "lose" as much or more through deceptive advertising and lack of information concerning what it is (including a warranty disclaimer) that they are buying, than they do as a result of physical harm caused by these products.[89]

The UCC does not alleviate the consumer's burden in this respect. The issuer of a card warranty is free to limit his liability for a great portion of the risk inherent in placing his product on the market. The warranty provisions of the Code are not designed to meet the problem of inequality of bargaining position regarding consumer purchases.[90]

84. The recovery may, for example, include such elements as damages to third persons who might forseeably be injured by defects. *See* UCC §2-318. *See also* United Pac. Ins. Co. v. Blalcrank, Inc., 175 Ohio St. 267, 193 N.E.2d 920 (1963).

85. The drop in sales, caused by raising prices to cover litigation losses, could force some marginal producers out of business. In any event, a rise in prices to cover such losses would be in effect, forcing some buyers to subsidize the injuries to others.

86. *See generally* Prosser, *The Assault Upon the Citadel*, 69 Yale L. J. 1099(1960).

87. *See generally* Comment, *Disclaimers of Warranty in Consumer Sales*, 77 Harv. L. Rev. 318 (1964).

88. Along with the celebrated *Henningson* case, discussed in note 2 *supra*, decisions such as State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc., 252 Iowa 1289, 110 N.W.2d 449 (1961) which held that the giving of an express warranty did not negative an auto dealer's implied warranty of fitness for use; and Pabon v. Hackensack Auto Sales, Inc., 63 N.J. Super. 476, 164 A.2d 773 (Super. Ct. 1960), which extended the implied warranty of fitness for use to all persons who, in the reasonable contemplation of the parties to the warranty, might be expected to become a user; have continued the trend.

89. Barber, *Government and the Consumer*, 64 Mich. L. Rev. 1203, 1209 (1966).

90. "The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power." UCC §2-302, comment 1.

Neither is it the purpose of the unconscionability clause to disturb allocable risk because of superior bargaining power.[91]

Although an express warranty is, ideally, the result of "dickering" between the buyer and the seller,[92] in most instances the consumer has no meaningful choice. However, while automobiles[93] and food[94] have been found to be essential to the maintenance of an "acceptable" standard of living, hence justifying judical actions overriding the restrictive provisions of disclaimers by sellers of these products, few other consumer goods are likely to meet this standard. Therefore, many products which are virtual necessities to a modern way of life are presumably sold on a take-it-or-leave-it basis. The result is that the absence of a true alternative may not render an otherwise valid card warranty limitation of liability unenforceable.[95]

Other factors have been suggested as providing a check on the power of the manufacturer. Some have argued that industry is subject to a pervasive "public consensus" which compels consideration of the consumer's interest in order to avoid governmental intervention or the emergence of new common law rules.[96] But this type of aid is slow in coming if it comes at all. Indeed, card warranties have found their most effective use in court as disclaimers and limitations of liability,[97] and the card warranty is probably more popular with manufacturers today than ever.

It has been suggested that the UCC requirements that all disclaimers be conspicuous[98] and more specific than under prior law, might embarrass manufacturers and dissuade them from exerting the full weight of their economic and legal power.[99] Yet, the card warranty, while generally complying with the directives of the UCC, has provided a method of avoiding embarrassment while retaining the ability to exert pressure. When a consumer signs a disclaimer and assumes the risk of loss, the cost of such risk no longer serves as an incentive to improvement of product quality or safety,[100] except to the limited extent allowed by

91. UCC §2-302, comment 1.

92. "Express warranties rest on 'dickered' aspects of the individual bargain. . . ." UCC §2-313.

93. *See* Henningson v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

94. Linn v. Radio Center Delicatessen, Inc., 169 Misc. 879, 9 N.Y.S.2d 110 (N.Y. City Mun. Ct. 1939).

95 *But see* Comment, 109 U. PA. L. REV. 401, 420 (1961).

96. *See* Berle, *Power Without Property,* 64 MICH. L. REV. 1198 (1966).

97. *See generally* Greenman v. Yuba Power Products, Inc., 27 Cal. Rptr. 697, 377 P.2d 583 (1955) ; Hydrotex Industries v. Floyd, 209 Ark. 781, 192 S.W.2d 759 (1946).

98. *See* UCC §2-316.

99. *See* Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 568 (1960).

100. *See* Comment, *Disclaimers of Warranty in Consumer Sales,* 77 HARV. L. REV. 318, 325. (1964)

the limits of the card warranty and the overriding provisions of the UCC. And, because these disclaimers are couched in the form of limited express warranties[101] they do not warn the consumer about the type of defect or harm that the product may cause. The card warranties appear to the consumer, rather, as much like advertisements and continuing propoganda for the manufacturer's product as they appear to be the warranties which they nominally are. The language on the warranty card will often congratulate the consumer on having purchased "a fine quality product" and will promise that, with proper care, the product will deliver "years of trouble free service." This language has the effect of obscuring the disclaimer provisions of the warranty.

Additional checks on the manufacturer's use of the card warranty as a limitation of liability arise if the conflict results in actual litigation.[102] The usual card warranty contains a far more extensive disclaimer of warranty than the manufacturer could ever reasonably expect to be able to enforce in court. For example, many card warranties contain clauses which purport to absolve the manufacturer from liability for all consequential damages. However, disclaimer clauses which attempt to limit consequential damages, at least so far as injury to the person is concerned, are made prima facie unconscionable by the Code,[103] and an implied warranty is extended to buyer's family and houseguests who may foreseeably use, consume, or be affected by the consumer goods.[104] In addition, the buyer has an action against the seller for breach of warranty where the buyer has been compelled to pay damages to a third person for injuries caused by the defective condition of an article manufactured or supplied by a seller.[105]

VI. Validity of the Card Warranty Disclaimer

Prior to the advent of the UCC, disclaimers and limitations of liability for breach of warranty were usually written as an integral part of the warranty.[106] A clause which gave a limited express warranty and stated it to be in lieu of all other warranties, express or implied, was

101. *See* Rasmus v. A.O. Smith Corp., 158 F. Supp. 70 (W.D. Iowa 1958).

102. For example, the burden of proving the existence and enforceable elements of a warranty is on the party relying upon it. Intrastate Credit Service, Inc. v. Pervo Paint Co., 1 Cal. Rptr. 182 (1965). The court may also require that a disclaimer must be brought to the attention of the buyer at the time of the sale. Joseph v. Sears Roebuck & Co., 224 S.C. 105, 77 S.E.2d 583 (1955).

103. UCC §2-719(3).

104. UCC §2-318. The section also states that a seller may not exclude or limit the operation of this provision.

105. United Pacific Ins. Co. v. Blalcrank, Inc., 195 Ohio St. 267, 193 N.E.2d 92 (1963).

106. Payne v. Valley Motor Sales, Inc., 724 S.E.2d 622 (W.Va. 1962).

generally held to be an effective disclaimer.[107] While the UCC provides that any clause disclaiming warranty liability or modifying warranty terms must be conspicuous,[108] there is no corresponding requirement concerning provisions which purport to regulate the extent of the seller's liability.[109] While the ommission may, in some cases, be remedied by resort to UCC § 2-302, which authorizes the court to void any "unconscionable" provision,[110] even this provision may be inadequate to fully protect the consumer. For example, comment one[111] to UCC §2-719 states that in every sales contract there must be at least a "fair quantum" of remedy for breach and that too great a restriction on remedy is subject to deletion as unconscionable. However, the section itself suggests the validity of a limitation to "repair and repayment of the price."[112] As previously noted, the seller or manufacturer is usually more than willing to make such adjustments.[113] Accordingly, this provision may leave the manufacturer free to effectively limit his liability to those elements of risk that he would in any event desire to assume.[114] If the consumer's damage is primarily economic, this limitation may close off his only effective remedy, since even the doctrine of strict liability in tort while often available in cases of harm to the person,[115] generally does not extend to cases in which the loss is economic.[116] The UCC provides that "limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable,"[117] it is silent on the question of the consumer's large property losses except for the negative

107. Shafer v. Reo Motors, Inc., 205 F.2d 685 (3d Cir. 1953); Lambrazo v. Woodruff, 256 N.Y. 92, 175 N.E. 525 (1931).

108. *See* UCC §2-316.

109. These provisions are U.C.C. §§2-718, allowing liquidation of damages subject to certain restrictions, and 2-719, whereby parties to a sale may agree upon warranty remedies in addition to or in place of those specifically provided by the Code.

110. *Cf.* UCC §2-719.

111. The comments to the Code do not have the weight of the Code provisions themselves, but they do have the weight of legislative history since state legislatures which have enacted the Code should be presumed to have been aware of them when they acted. *See* E. FARNSWORTH & J. HONNOLD, COMMERCIAL LAW 7-10 (1965).

112. The agreement may . . . limit or alter the measure of damages recoverable . . . . as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-performing goods or parts. . . .

UCC §2-719(1)(a).

113. *See* note 82 *supra* and accompanying text.

114. But this provision is subject to UCC §2-719, which states that there must be, in every contract, at least a fair quantum of remedy or else the contract will be voided as unconscionable.

115. *See* Prosser, *The Assault Upon the Citadel*, 69 YALE L. J. 1099 (1960).

116. Seely v. White Motor Co., 45 Cal. Rptr. 17, 403 P.2d 145 (Sup. Ct. 1965).

117. UCC § 2-719(3).

inference to be drawn from UCC § 2-719 (3).[118]

There have, however, been several notable exceptions to the interpretation of the strict liability doctrine which would exclude economic damage as a measure of recovery. The New Jersey Supreme Court, in the case of *Santor v. A & M Karagheusian,*[119] allowed the ultimate purchaser of loomed carpeting to maintain an action for breach of the implied warranty of fitness for use. The action was maintained even in the absence of privity of contract and even though damages were limited to the loss of the value of the carpeting.[120] The court allowed the buyer to maintain the action because of "considerations of justice" and stated that the defective product need not necessarily be dangerous to life and limb or to the interests of society as a whole[121] in order that one who suffers a loss be allowed to recover.[122] The New Jersey court, refused to draw a distinction between property damage and damage to the person.[123] The court stated that where a manufacturer puts a worthless article in the hands of a consumer, the manufacturer should be responsible for the loss he causes to the purchaser.[124] The decision also points up a little-discussed portion of the now famous *Henningson*[125] case in which the buyer was also allowed to recover the value of the automobile which, because of its defective condition, had caused injury to his wife.[126]

While consumers have sometimes been successful in asserting the card warranty's protection, manufacturers generally have been unable to invoke the protection of the disclaimer provisions. The situation presented in *Joseph v. Sears Roebuck & Company*[127] was similar to the facts of the *Greenman* case in which the buyer recovered. However, in *Joseph* the seller was the party relying upon the warranty. The consumer had purchased a pressure cooker from seller's store. When the cooker exploded and injured the buyer during normal use, recovery was sought by the buyer. The seller asserted that a printed "guarantee," contained in the instructions book which came packaged with the cooker, limited his

118. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not. UCC §2-719(3).

119. 44 N.J.52, 207 A.2d 305 (N.J. 1964).

120. *See also* Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

121. These were some of the factors which were considered as reasons militating in favor of allowance of an action of this type in the court's earlier decision in Henningson v. Bloomfield Motors Inc., 32 N.J. 358, 161 A.2d 69 (1960).

122. 44 N.J. 52, 207 A.2d at 305.

123. *Id.* at 308.

124. *Id.* at 309. *See also* Randy Knitwear, Inc. v.American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399 (1962).

125. 32 N.J. 358, 161 A.2d 69 (1960).

126. Santor v. A & M Karagheusian, 44 N.J. 52, 207 A.2d 305, 308 (1965).

127. Greeman v. Yuba Power Products, Inc., 59 Cal.App. 2d 67, 377 P.2d 897 (1963).

liability to replacement of the cooker. Even though the consumer admitted that she had read the instruction book carefully, the court refused to give effect to the "guarantee" as a disclaimer.[128] The court held that the "guarantee" would have to be called to the attention of the buyer at the time of purchase in order for it to operate as a effective disclaimer.[129]

The question remains as to the impact of the rationale of the *Joseph* case upon a "mail-in" card warranty in the same situation. As noted previously, the "mail-in" card warranty is more likely to be held enforceable.[130] However, even if the warranty is given effect the question would remain as to the effect the disclaimer provision of the warranty would have.

CONCLUSION

The card warranty functions on a variety of levels and may often be used by the consumer to his advantage. But the card warranty still remains as a potential source of danger to the uninformed consumer. It must be understood that the card warranty is not attached to the product by the manufacturer in order to "give" anything to the consumer other than a limited assurance concerning repair of the product should it break down. The cards function as advertisements for the products and, on several levels, as disclaimers and limitations of liability. Only secondarily does the card warranty function as a protective device for the modern purchaser of consumer goods.

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128. Joseph v. Sears Roebuck & Co., 224 S.C. 105, 77 S.E.2d 583 (1955). The case is discussed in section II *supra.*

129. *Id.*

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

APPENDIX I

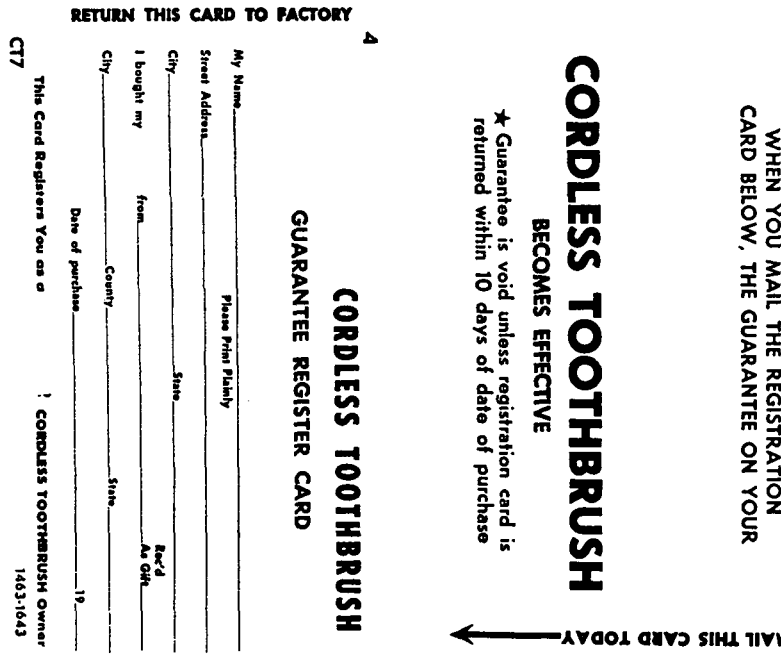
An example of the "non-mail-in" type of card warranty. The examples in Appendix II on next page are a "mail-in" card warranty and certificate.

GUARANTEE

Every product is thoroughly tested and inspected before it leaves our factory. Should it fail to give satisfactory service, return the complete product to our nearest Factory Service Center, or to a Authorized Service Station, with transportation charges prepaid. We guarantee to replace free of charge any part or parts found by us to be defective due to faulty material or workmanship, provided repairs have not been made or attempted by others. This guarantee does not cover damage caused by misuse, negligent handling, or normal "wear and tear." No other guarantee, written or verbal, on our products is authorized by us.

This guarantee is backed by numerous Factory Service Centers and Authorized Service Stations throughout the country. See the complete listing on the back cover.

APPENDIX II



WARRANTY

All instruments identified as models are guaranteed against defects in materials and workmanship of parts in the radio and/or amplifier chassis, for five years and all other tubes and parts for one year and the diamond stylus against excessive wear for ten years from the date of sale to the original purchaser. Repair service required during the first three months after date of sale and initial installation service of console models, will be furnished without charge.

The Company has agreed through its dealers for the replacement, as herein set forth, of tubes and parts which prove to be defective within the applicable warranty period, provided that such defect is brought to the attention of the dealer from whom the instrument was purchased. A worn stylus will be replaced when presented to the dealer together with the Diamond Stylus Certificate, provided that his examination discloses a degree of wear that would cause distortion and/or excessive record wear. If stylus is to be replaced in the instrument itself, a reasonable labor charge will be made for such added service.

Portable and table television models to be repaired under the three months labor warranty, must be delivered to the dealer's service department or a Warranty Service Center and picked up after the repairs are completed.

Replacement parts are guaranteed only for the remainder of the original applicable warranty period.

instruments are sold only through carefully selected dealers of recognized integrity and the company's guarantee applies only to instruments which have been purchased from authorized dealers in the United States and is limited to normal usage of the instrument in the United States. Overseas customers will be advised by the seller, at the time of product sale, of any applicable warranty provisions. Similarly, this guarantee does not apply if the instrument serial number has been altered, effaced or removed.

The warranty registration card supplied with each instrument must be completed by the original purchaser and mailed to The Company, within 10 days after installation to make this warranty effective.

This warranty may be modified by notice from the Company to its dealers, but no modification will effect instruments previously sold by its dealers.

18 2529-1