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EFFECTS OF THE MAGNUSON-MOSS ACT UPON CONSUMER PRODUCT WARRANTIES

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This article concerns the problem of redressing the disappointed economic expectations of consumer purchasers. Traditionally, this problem has been addressed by the law of warranty—state law contained in the Uniform Commercial Code.¹ But with the passage of the Magnuson-Moss Act² in 1975, federal law and the Federal Trade Commission will increasingly intrude. The federal legislation is of particular interest in jurisdictions such as North Carolina that lack special state legislation governing consumer product warranties.³

The Magnuson-Moss Act provides the focal point for discussion. A full understanding of the Act, however, requires consideration of the law and practices existing prior to the Act, at which its provisions are directed. Part I, therefore, discusses two patterns of warranty behavior common in consumer transactions and the effect given to such behavior under the Uniform Commercial Code. This first section closes with a summary of problems consumers face under the Code. Part II turns to a discussion of three aspects of the Magnuson-Moss Act: (1) attempts to improve the clarity of warranty terms in consumer sales through rules governing disclosure of terms and pre-sale availability of warranties; (2) attempts to increase the substance of warranties given by inducing warrantors to comply with “minimum federal standards for warranty”;

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1. N.C. GEN. STAT. §§ 25-1-101 to -10-105 (1965 & Cum. Supp. 1975). The Uniform Commercial Code (hereinafter referred to in the text as the U.C.C. or Code) has been adopted in all states save Louisiana. Citations throughout are to the 1972 Official Text, which is identical to the North Carolina text in the sections here considered.

2. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (Supp. V 1975) (originally enacted as Act of Jan. 4, 1975, Pub. L. No. 93-637, 88 Stat. 2183). The statute will hereinafter be referred to as the Magnuson-Moss Act or simply the Act.

3. Several states have adopted non-uniform versions of the Code sections on warranty, disclaimer and limitation of remedy that alter their application to consumer transactions. *See, e.g.*, MASS. ANN. LAWS, ch. 106, § 2-316A (Michie/Law. Co-op 1976). And some states have adopted more comprehensive special legislation. *See* Song-Beverly Consumer Warranty Act, CAL. CIV. CODE §§ 1790-1797.4 (West 1973 & Cum. Supp. 1977).

and (3) attempts to improve the remedies available to consumers, especially by encouraging "informal dispute settlement mechanisms." Throughout this section, the chief concern is to identify specific problems that the Act was designed to solve and to assess whether the techniques of regulation employed are likely to contribute to a solution. Finally, Part III deals generally with some questions suggested by the legislative history of the Act and discusses whether alternative solutions should have been, or should now be, considered.

I. PATTERNS OF CONSUMER WARRANTY BEHAVIOR PRIOR TO THE MAGNUSON-MOSS ACT

A first step toward understanding the Magnuson-Moss Act is to understand the patterns of warranty behavior that existed prior to the Act's passage. Two patterns of typical conduct will be examined: sales with no formal warranty and sales with a limited express warranty promising repair or replacement. Of course, these two modes of conduct are not the exclusive means of selling, but the majority of consumer products are probably sold on one of these bases.⁴ Since the Magnuson-Moss Act was intended to reduce problems particularly associated with the latter form of warranty behavior, it will be instructive to consider the reasons that may have led sellers to favor a limited express warranty and the effect given it under the Code. When the business and legal climate within which such warranty behavior flourished has been examined, a proper background will also exist for viewing the problems surrounding each from a consumer perspective.

A. *Sales with No Formal Warranty*

A large number of consumer products have traditionally been sold without any attempt on the part of either a manufacturer or seller formally to set forth the warranty liabilities undertaken. This is typically the case with small, inexpensive items. Sometimes, however, large expensive items are sold in the same manner. Clothing is usually and furniture is often sold with no formal warranty.

A sale with no formal warranty means only that the seller has not knowingly sought to create sales through use of or to accompany sales with some standardized promise or affirmation. It is quite incorrect to

4. A third common type of warranty term is the "satisfaction guarantee." A limited discussion of the use and effects of such terms appears in note 18 *infra*.

conclude that no warranty liability is created, however. For instance, U.C.C. section 2-313 envisions creation of express warranty liability in three ways: through a promise or affirmation, through a description of the goods or through a sample or model.⁵ In no case is it required that the seller have an intention to warrant; it is sufficient if the promise, description or sample becomes a part of the "basis of the bargain."⁶ In individual sales, statements or conduct by the seller often will have created express warranty liability in one or more of these ways. Most goods are sold with a description, albeit a general one, sufficient to create liability.

Whether or not express warranties have been created in an individual transaction, implied warranties will exist in nearly all sales with no formal warranty. If a seller is a "merchant,"⁷ the Code requires that the goods be "fit for the ordinary purposes for which such goods are used."⁸ A further implied warranty that the goods be fit for the particular uses of the purchaser *may* arise, depending on the circumstances of the individual transaction.⁹ The remedies available to the buyer in the above situation should also be briefly considered. Minimally, the buyer

5. U.C.C. § 2-313 provides:

Express Warranties by Affirmation, Promise, Description, Sample

(1) Express warranties by the seller are created as follows:

- (a) 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.
- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

6. *Id.*

7. "Merchant" is defined to include "a person who deals in goods of the kind," which will include virtually all professional sellers to consumers. U.C.C. § 2-104(1).

8. U.C.C. § 2-314 provides in part:

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .

(2) Goods to be merchantable must be at least such as

(c) are fit for the ordinary purposes for which such goods are used

Although fitness for ordinary use is only one standard imposed by a merchantability warranty, it is the most important one, at least in the context of consumer transactions.

9. U.C.C. § 2-315.

will have a damage action for the breach of warranty;¹⁰ he may recover consequential damages, if appropriate, as well.¹¹ And if the nonconformity of the goods substantially impairs their value to the buyer, he may have a right to revoke acceptance of the goods and return them to the seller.¹²

All the above liabilities are liabilities of the seller. Unless the manufacturer sold directly to the consumer, which would be atypical, there would be no privity between manufacturer and consumer. Since under traditional views privity is a requirement of a warranty action against the manufacturer,¹³ the manufacturer's willingness to sell without formally delineating warranty liability does not require explanation.

10. *Id.* § 2-714(2).

11. *Id.* § 2-715.

12. *Id.* § 2-608. Substantial impairment of the value of the goods to the buyer is only one of the conditions that must be satisfied to proceed under this section.

13. Despite considerable relaxations in the requirement of privity, it will normally remain a requirement when the action seeks to recover economic loss. See Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917 (1966); Annot., 16 A.L.R.3d 683 (1967). One should distinguish tort actions, where the requirement, once imposed, has been abandoned. See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS chs. 16, 17, esp. at 634-35 (4th ed. 1971). Only a few jurisdictions have extended tort doctrine to the recovery of loss of expectation. Compare *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), with *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965). Additionally, prior to the adoption of strict tort doctrine, some jurisdictions had relaxed the requirement of privity substantially in personal injury recoveries under a warranty theory. E.g., *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

Following the adoption in such a jurisdiction of strict tort liability, it is not clear whether the earlier relaxations will continue to have vitality in "true" warranty cases. *Henningsen*, for instance, was later reinterpreted by the New Jersey court as involving a strict tort principle. *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 63-64, 207 A.2d 305, 311 (1965).

North Carolina, which has not adopted strict tort liability, has also allowed only narrow exceptions to the privity requirement, even when personal injury is involved. *Teddar v. Pepsi Cola Bottling Co.*, 270 N.C. 301, 154 S.E.2d 337 (1967); *Terry v. Double Cola Bottling Co.*, 263 N.C. 1, 3, 13, 138 S.E.2d 753, 754, 761 (1964) (Sharp, J., concurring); see Hodge, *Product Liability: The State of the Law in North Carolina*, 8 WAKE FOREST L. REV. 481, 504-06 (1972). *Corprew v. Geigy Chem. Corp.*, 271 N.C. 485, 157 S.E.2d 98 (1967), has been cited as allowing an implied warranty action with no requirement of privity. 1 PROD. LIAB. REP. (CCH) ¶ 1200.34 (1975). The case involved damage to a crop caused by an insecticide, labeled with an apparently inaccurate warning; it is possible to read the case narrowly, focusing upon the presence of direct representations. It is important, however, that the loss involved was economic and the product clearly does not fit within the North Carolina "food and drink" exception. At least one case since has given *Corprew* a very narrow reading. *Byrd v. Star Rubber Co.*, 11 N.C. App. 297, 181 S.E.2d 227 (1971). *Corprew* is discussed in Hodge, *supra*, at 492-93. For the present, North Carolina may be regarded as generally adhering to the privity requirement when the only loss is economic. Cases in which the warranty is, by its terms, extended directly to the ultimate consumer present a different issue. By definition, however, the sale without formal warranty does not involve such warranties.

What does require explanation is the seller's willingness to do so. It would be entirely possible for the seller to avoid all or most of the obligations arising in a sale without formal warranty simply by incorporating a careful disclaimer and limitation of remedy clause in the transaction.¹⁴ Yet this is not a typical pattern: sales of new goods without a formal warranty are usually sales without disclaimer as well. Some reflection on the actual liabilities likely to ensue in this type of sale may explain this.

Perhaps a seller's greatest fear is liability for personal injury or property damage caused by goods he has sold. Cases of personal injury are those in which a manufacturer also faces the greatest prospect of liability, either directly at the hands of the ultimate consumer or in a third-party action by the intermediate seller.¹⁵ Thus, it is noteworthy that many of the types of goods that are sold without formal warranty are those that are not prone to causing this type of loss, such as furniture or clothing.

A second fear of sellers is return of items due to some minor and perhaps curable nonconformity, forcing the seller to take a loss on the item to its second-hand value. Here again, it seems likely that goods typically sold without a formal warranty (clothing, furniture) present a different package of risks than those typically sold with a formal warranty (automobiles). First, the simpler technology of the former goods reduces the likelihood of latent defects and, thus, of any return at all.¹⁶ Secondly, it may be considerably easier to determine the *causes* of alleged defects in the simpler product. The potential area for mistrust and disagreement between the parties is reduced, even when return is attempted.

A final consideration for the seller is that certain types of goods create more competitive pressure for a liberal return policy than others.

14. U.C.C. §§ 2-316 (disclaimer) and 2-719 (limitation of remedy) are discussed more fully in the text accompanying notes 30-35 *infra*.

15. As stated, *supra* note 13, privity has been relaxed principally in personal injury cases. Even if privity has not been relaxed, it is often possible for each supplier in the chain of distribution to sue the prior party with whom he is in privity, until liability reaches the manufacturer. The large sums involved in personal injury cases make this a more real danger than it is when only the value of the product is involved.

16. As to goods available for inspection at the time of purchase, easily discovered defects will usually result either in a discount or no sale. Even when simple goods are packaged, and thus not available for inspection, obvious defects will usually be discovered immediately upon breaking the package. Prompt return leaves the seller confident that the "defect" was pre-existing, rather than caused by abuse; accordingly, return will probably be accepted. This latter point is more fully developed in the text.

Clothing is a convenient example. The number of "defective" ties or dresses is slight in comparison with the number that do not, on reflection, suit the purchaser's taste. Recognizing the importance of "taste" in this trade, stores may be committed to a liberal return policy because a "sticky" policy may have an inhibiting effect on purchasers. A seller already committed to allowing return on a "taste" basis is unlikely to see the utility of trying to restrict return of items that are actually defective.

In sum, a sale with no formal warranty usually will not subject a non-privity manufacturer to liability for economic loss.¹⁷ A seller who is in privity, however, theoretically is subject to extensive liabilities in this type of sale. But it is probable that the sale without formal warranty is used predominantly when the nature of the goods sold tends to minimize the actual risks the seller undertakes.¹⁸

B. *The Limited Repair Warranty*

A second way in which goods are commonly marketed is with a limited repair warranty. Under a warranty of this type, the manufactur-

17. See Note, *supra* note 13; Annot., 16 A.L.R.3d 683 (1967). The most important exception will be the possibility of an express warranty action based on advertising or the like, rather than on a warranty intentionally extended by the manufacturer to the purchaser.

18. Goods are sometimes sold with an assurance of "satisfaction guaranteed." In such a case, the goods may be returned by a buyer, even though there is no "non-conformity." The seller has taken on the additional obligation of satisfying the buyer. U.C.C. § 2-326, Comment 1. Such a contract does not involve an illusory promise, so long as the contract is construed as requiring that the buyer's dissatisfaction must be either "good faith" dissatisfaction or "reasonable" dissatisfaction. See 3A A. CORBIN, CONTRACTS §§ 644-46 (rev. ed. 1960). Sellers frequently follow this policy informally in the adjustment of potential disputes even when the goods are sold with no formal warranty. And one use of the "satisfaction guarantee" is to assure purchasers of such a policy in situations where this is thought necessary. Thus, mail order houses often conspicuously note this policy in their catalogues. But it is also possible that in a seller's mind, the "satisfaction guarantee" is desirable not so much for its extension of the seller's obligation, as for the limited remedy—refund—that it promises.

U.C.C. § 2-326, Comment 1 states in part:

The right to return the goods for failure to conform to the contract does not make the transaction a "sale on approval" or "sale or return" and has nothing to do with this and the following section. The present section is not concerned with remedies for breach of contract. It deals instead with a power given by the contract to turn back the goods even though they are wholly as warranted.

That a right to reject for non-conformity does not make a transaction a "sale on approval" is clear; but what are the rights of a purchaser who obtains on an "approval" basis goods that not only dissatisfy him, but are also "non-conforming"?

It is arguable that in a sale on approval, the "satisfaction" standard is in lieu of any warranty, and that implied warranties are excluded by usage of trade in such transactions. U.C.C. §§ 2-316(3)(c), 2-317. But given the hostility of the Code to disclaimers, it is certainly equally arguable that the "satisfaction" standard is in addition

er or seller usually promises to remedy any defects in the goods for a specified period of time. Such warranties typically accompany automobiles, nearly all heavy appliances, many light appliances and consumer goods of a mechanical, electrical or electronic nature.¹⁹

Such a warranty provision, when carefully drawn, has several discrete components. The first of these is a narrowly drawn express warranty. This typically provides that the goods shall be "free from defects in parts or workmanship" for a specific period of time. The second is a disclaimer of all other express and implied warranties. Third, the term provides that the exclusive remedy for breach of the express warranty that is given is repair or replacement of defective parts. Finally, the term usually specifically excludes liability for consequential loss.²⁰ When such a provision is properly drawn, explicit support for

to any warranty obligation present in the contract. Under *id.* § 2-719(1), an agreed remedy is optional, unless expressly agreed to be exclusive. A "satisfaction guaranteed or money back" clause should not be held to meet this requirement when there is a breach of warranty and not merely a failure to meet the satisfaction of the purchaser. Thus, all Code remedies would be available. It is perhaps more arguable that when the seller's only non-performance is failure to satisfy the buyer, the buyer's only remedy is return and refund.

Regardless of the actual legal effect of such clauses (which is less than clear), the practical effect usually will be to terminate the dispute when the seller complies with this limited remedy. Whether this form of remedy is a sensible one from a seller's viewpoint will again depend on the nature of the goods. The relevant considerations are essentially the same as when goods are sold with no formal warranty. When the goods in question are likely to cause consequential damage if they are defective, or if the performance standard of the goods is ill defined, a limited repair warranty may be more appealing to manufacturers and sellers. This point is discussed fully in the following text. The effects of the Magnuson-Moss Act upon the "satisfaction guarantee" are discussed briefly, note 86 *infra*.

19. The use of such warranties is by no means restricted to a consumer context. This tends to support the proposition that the use of such warranties is related to the type of risks associated with particular types of goods and is not simply a matter of bargaining power.

20. A typical provision was involved in *Lankford v. Rogers Ford Sales*, 478 S.W.2d 248 (Tex. Ct. App. 1972):

Basic Warranty

Ford Motor Company warrants to the owner each part of this vehicle to be free under normal use and service from defects in material and workmanship for a period of 24 months from the date of original retail delivery or first use, or until it has been driven for 24,000 miles, whichever comes first. . . .

All the warranties shall be fulfilled by the Selling Dealer (or if the owner is traveling or has become a resident of a different locality, by any authorized Ford or Lincoln-Mercury dealer) replacing with a genuine new Ford or Ford Authorized Reconditioned part, or repairing at his place of business, free of charge including related labor, any such defective part. . . .

The warranties herein are expressly IN LIEU OF any other express or implied warranty, including any implied WARRANTY of MERCHANTABILITY or FITNESS, and of any other obligation on the part of the Company or the Selling Dealer.

Id. at 250.

each component may be found in the Uniform Commercial Code.²¹

It is helpful to compare the risks that surround the sale of goods commonly sold with a limited repair warranty with the risks already outlined for goods commonly sold without a formal warranty term. Automobiles and clothing provide convenient examples. Consider first the substitution of an express warranty against defective parts and workmanship for all other warranties express or implied. It is unlikely that *if* such a substitution were attempted in the case of clothing it would be of much significance. That is, the principal way in which clothing is "unmerchantable" is through defects in workmanship or "parts." In the case of an automobile, however, the manufacturer hopes, by substitution of an express warranty against defective parts and workmanship, to replace the vague performance requirements imposed by the Code's merchantability warranty with a simple requirement that the individual automobile conform to the standard characteristics of the model line. From the manufacturer's perspective, the good sense of this substitution is evident, not because it imposes a *lesser* burden, but because it imposes a more manageable one. Performance standards for cars are not precisely defined by a requirement of "fitness for ordinary use." If a car has slow acceleration, how slow may it be and still be "fit"? The prospect of haggling, after the fact, about the "fitness" of a particular car measured by a vague standard is not alluring to manufacturers.

Avoidance of the merchantability warranty does not necessarily result in a "lesser burden" on manufacturers since the question of whether a particular product is "fit for ordinary use" is tested by the marketplace. Furthermore, as "fitness" is less an absolute standard than a relative one at a given price, consumer choice is maximized. One may pick a "very fit" car or a "somewhat fit" car, presumably available at a somewhat lesser price. One is not protected from the foolishness of a poor choice of model: the model characteristics are matters on which the consumer can inform himself before purchase. One is protected from the possibility that the individual unit may not meet the model standard, because the limited express warranty embodies a commitment to repair the car up to that standard for a specified period of time.²²

A careful seller will probably employ a merger-clause as well, in order to minimize problems with asserted oral warranties.

21. U.C.C. §§ 2-313, 2-316(1) (substitution of one express warranty for other express warranties), 2-316(2) (disclaimer of implied warranties), 2-719 (limitation of remedy to repair or replacement and exclusion of consequential damages).

22. This is not the form in which the express warranty is written, but this is its approximate effect. The surest way of establishing a "defect in parts or workman-

This "division of function," with the market requiring the manufacturer to produce a sensible design²³ and the warranty requiring that individual units conform to the design, accords well with the practical organization of design and quality control by the manufacturer.²⁴

Goods sold with a limited repair warranty also pose different risks associated with return of goods. This results in part from the greater complexity of such goods, which introduces two complicating factors. First, it is more difficult to determine causes of malfunction; second, longer periods may elapse before a malfunction of the goods becomes evident. The difficulty of determining causation, which may amount to impossibility for those without expertise, provides fertile ground for ignorance to grow into mutual distrust and inhibits a rational adjustment of the dispute. The longer period during which defects may be reported accentuates the problem. Tardiness in reporting an obvious defect suggests that the "defect" was not present at time of sale; it is not sensible, however, to draw this inference when the goods are complex and the defect hidden. Yet if a supplier allows a longer period to report defects, the possibility of intervening causes is also increased.

ship" is to establish that the particular unit does not conform to the standard for the product line. A troubling situation can arise when an owner receives a car that is not defective, in the sense that it complies with the manufacturer's design, but that admittedly does not perform so well as most other cars of the same model. See Whitford, *Law and the Consumer Transaction: A Case Study of the Automobile Warranty*, 1968 Wis. L. REV. 1006, 1032 n.66 [hereinafter cited as Whitford, *Automobile Warranty*].

23. This view will seem hopelessly unrealistic to some, who survey the automobile market and do not see a single model that they regard as sensible. But their experience is not inconsistent with the above argument. The market has never been presumed responsive to every individual's wants, but only to aggregate demand. One's particular preferences are important only as they are shared by others. The complaint that one cannot obtain a "sensible" model is thus a complaint that one's views are not shared by others. It seems a questionable response for one who is thus offended by the imposition of majority tastes in turn to impose minority taste upon the majority.

Two qualifications are in order. The first relates to the "transient" values of buyers. In this view, the moment of sale is a "weak moment," when the buyer momentarily abandons his "true" values and acts on another, presumptively less rational, set of values. This type of buyer vacillation does not seem a sound basis for imposing burdens on sellers. The notion may extend further, however: the seller is culpable in such situations, because he knows of and encourages the "bad" set of values, playing upon his buyer's known weakness. See generally V. PACKARD, *THE HIDDEN PERSUADERS* (1958). Even if one accepts this view, the proper means of intervention are not clear.

A second qualification relates to the propriety of such an analysis given the oligopolistic market structures that predominate in the economy. See Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 Wis. L. REV. 400, 429 [hereinafter cited as Whitford, *Disclosure Regulation*].

24. Once it is decided to use a limited repair warranty, it is evident that the manufacturer is the logical party to give it: it is the manufacturer who sets design and performance standards for the goods, and has accumulated the necessary expertise to make a "fulfillable" promise.

Since the goods are more complex, they are more likely to suffer abuse. More care may be required in using them, and they may be more sensitive to misuse. These considerations undoubtedly recommend a limited repair warranty to the manufacturer and seller: the opportunity to cure defects that such a warranty affords reduces the danger of precipitate returns.²⁵ The same considerations probably recommend a limitation of the warranty period to a time well within the manufacturer's expected life for the product under normal use. A further consideration militates for a short warranty period. In most instances, the consumer will lack any means of determining whether the manufacturer is honestly investigating and reporting the causes of a defect of a returned item. The manufacturer stands to lose the goodwill of the customer if the manufacturer determines, albeit accurately, that the product had no defect, unless the consumer believes this finding. As a result, manufacturers may prefer to "overfulfill" the warranty obligation, providing warranty service in doubtful cases.²⁶ This may be balanced by providing a very short warranty period, which will cut off protection for some defects. Instead of attempting perfect accuracy in each case, probabilities are assessed. If a television set that will last two years under normal use malfunctions within ninety days, the likelihood that it was defective is high and the risk of abuse low.²⁷

A third characteristic of goods sold with a limited repair remedy is that they may only be resold at a substantially discounted price. The seller is thus very reluctant to allow return of the goods. This is especially true of big ticket items, such as automobiles, boats, mobile homes and many heavy appliances. In such instances, the loss incurred when the formerly defective goods must be sold at a second-hand value may be far in excess of the limited cost of repair. Thus, the seller has a

25. This advantage of the limited repair warranty has long been recognized:

The farm-machinery case will serve as an instance: one fair part of the time, the supposed "defect" of the machine is in fact a defect of the farmer's knowledge about its operation; the visit of the repairman is at the same time the visit of an instructor, and not only cures the defect, but prevents further dispute. To condition rejection or rescission, in such a case, on the failure of preliminary reasonable efforts to repair, is normally the best of sense.

REVISED UNIFORM SALES ACT § 57, Comment A(2)(b) (Draft No. 2, 1941). To the extent that consumers may wrongfully attempt precipitate returns in such situations, the limitation of remedy to repair reduces the stake in controversy and tends to protect them from the consequences of their mistakes.

26. Whitford, *Automobile Warranty*, *supra* note 22, at 1028.

27. And if it is quite clear that the malfunction, although occurring outside the warranty period, is due to a manufacturing defect, the warrantor may extend coverage. *See id.* at 1037-38.

strong interest in precluding the buyer's revocation of acceptance and binding him instead to accept repair. Again, the contrast with clothing is illustrative: in cases where the return occurs simply on the basis of taste, the goods may simply go back on the rack. When a defect is involved, it is less clear that the second-hand price will be so disproportionate with the actual diminution of value: this is largely because purchasers can judge impairment in value of simple items such as clothes more readily than that of mechanical or electrical equipment.

Preference for the limited repair warranty in sales of some goods may also be attributed to the threat posed by consequential loss, not only consequential *economic* loss, but more importantly, personal injury and property damage. The limited repair warranty seeks to avoid liability for such loss. Certainly the danger posed by such liabilities is evident in the case of automobiles; mechanical, electrical and electronic gadgets in general pose such dangers to a larger degree than such items as clothing and furniture.²⁸ In cases involving personal injury, plaintiffs have enjoyed considerable success in breaking down the requirement of privity that once served to insulate the manufacturer from direct warranty liability to consumers. Therefore, the manufacturer susceptible to personal injury and property damage liability—rather than the direct seller—typically extends the limited repair warranty.

Since it is the limited repair warranty, in its various forms, that is the principal target of the Magnuson-Moss Act, further discussion of such provisions under the Uniform Commercial Code is appropriate. As has already been noted, Code support is available for each component of a well drafted limited repair warranty.²⁹ It would be wrong, however, to conclude from this that such provisions are given effect in all situations. In fact, the enforceability of such provisions is a substantially more complex question. It is best attacked by separating two issues: the degree of freedom of contract the parties enjoy in setting the performance standard and the degree that they enjoy in establishing the remedies that will be available in the event the standard is not met.

1. Setting the Performance Standard

Two provisions of the standard limited repair warranty address the issue of performance standard: the narrow express warranty against

28. This is a relative, rather than an absolute, distinction. Clothes, for instance, may be flammable.

29. See note 21 *supra*.

defective workmanship and parts and the disclaimer of all other warranties express and implied. Section 2-316(1) provides that words relevant to the creation of an express warranty and words tending to negate warranty shall be construed as consistent whenever reasonable; if such a construction is not reasonable, the negation is inoperative.³⁰ There is no difficulty in construing the well drafted limited repair warranty: it will be so drawn as to make clear that *one* express warranty is given; the disclaimer applies to all others. Similarly, section 2-316(2), while it may trap a few unwary or careless sellers, will pose no difficulties for the well counseled.³¹ The limitations it imposes upon disclaimer of implied warranties are strictly formal: so long as the prescribed formulae are followed, no substantive bar to disclaimer of implied warranties is imposed.

If the limited repair warranty so easily withstands scrutiny under the two Code sections most directly applicable to it, it might seem beyond attack. There is some authority in the Official Comments to the Code supporting the notion that the seller is always free to disclaim warranty,³² and a respectable argument may be made for this position.³³ It is also arguable, however, that the limited repair warranty may be subjected to scrutiny under the Code's unconscionability section.³⁴ Sec-

30. U.C.C. § 2-316(1):

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

31. *Id.* § 2-316(2):

Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

32. *Id.* § 2-719, Comment 3 states:

Subsection (3) recognizes the validity of clauses limiting or excluding consequential damages but makes it clear that they may not operate in an unconscionable manner. Actually such terms are merely an allocation of unknown or undeterminable risks. The seller in all cases is free to disclaim warranties in the manner provided in Section 2-316.

33. See J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 386-92 (1972); Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 516-28 (1967).

34. U.C.C. § 2-302. Unconscionable contract or clause—

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

tion 2-316(2), for instance, may be read as setting forth necessary, but not sufficient, conditions for the effectiveness of a disclaimer. While arguments of unconscionability have had some success when personal injury was involved, they have fared less well when loss was only economic. In a few states, non-uniform versions of section 2-316 have been adopted, precluding disclaimer in consumer sales.³⁵ But this part of the limited repair warranty should pass muster under the current law of most states.

2. Determining the Remedies Available for Breach

Two provisions of the limited repair warranty often deal with remedies available for breach. The first restricts the buyer to accepting repair or replacement by the seller as the exclusive remedy for breach of the sole express warranty. Such terms are specifically provided for by U.C.C. section 2-719(1).³⁶ The second excludes liability for consequential loss. The Code validates such terms when they are not unconscionable.³⁷ Leaving aside the separable issue of personal injury, there is no significant case law denying validity to such terms when the consequential loss is economic, even when the term is embodied in a consumer contract. In addition to the substantive prohibition against unconscionable exclusions of consequential damages, however, section 2-719(2) contains a second limitation upon the parties' ability to fashion remedies, which has proved to be of increasing significance in consumer transactions involving a limited repair warranty. That section states: "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act."³⁸ This section has been utilized to provide a buyer with the Code's full range of

35. See, e.g., MASS. ANN. LAWS ch. 106, § 2-316A (Michie/Law. Co-op. 1976). The UCC Reporter Service, "Current Materials" volume collects the non-uniform provisions by state.

36. U.C.C. § 2-719:

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts

37. *Id.* § 2-719(3).

38. *Id.* § 2-719(2).

remedies, including consequential damages, when the buyer is either unwilling or unable to repair defective goods within a reasonable time.³⁹

3. Summary

While some states have restricted the use of disclaimer in consumer sales, in many jurisdictions, including North Carolina, warrantors remain free to substitute a narrow express warranty for the Code's implied warranties and to choose what they regard as an appropriate duration for that express warranty. Likewise, the warrantor is free to restrict the remedies available for breach of warranty; here, however, the developing case law imposes a requirement that repair be effected within a reasonable time, or the buyer will be allowed recourse to his normal Code remedies.

C. Problems Faced by Consumers Under the Existing Patterns of Warranty

In the preceding subsections of this Part, an attempt has been made not only to describe the effect under prior law of two common warranty terms, but also to understand some reasons why manufacturers and sellers may prefer one or the other for particular types of goods. This enables a more accurate assessment of the likelihood that warrantors will voluntarily abandon a pattern of behavior and of the wisdom of requiring them to do so. But such a consideration from the vantage point of manufacturers and sellers must be balanced: consumers survey the same scene but see its operation quite differently. In this subsection, some of the types of consumer dissatisfaction created by current warranty behavior are considered. Only a summary is provided, as individual problems will be discussed in Part II in conjunction with the provisions of the Magnuson-Moss Act that are directed to their solution.

A first complaint is that consumer product warranties confuse or even deceive purchasers, and that purchasers, therefore, do not under-

39. *E.g.*, *Beal v. General Motors Corp.*, 354 F. Supp. 423 (D. Del. 1973); *Ford Motor Co. v. Gunn*, 123 Ga. App. 2d 550, 181 S.E.2d 694 (1971); *Eckstein v. Cummins*, 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974); *Moore v. Howard Pontiac-American, Inc.*, 492 S.W.2d 227 (Tenn. App. 1972), *cert. denied*, 492 S.W.2d 227 (Tenn. 1973); *cf.* *Lilley v. Manning Motor Co.*, 262 N.C. 468, 137 S.E.2d 847 (1964) (pre-Code). See generally Eddy, *On the "Essential" Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719(2)*, 65 CAL. L. REV. 28 (1977).

stand the terms of the bargain into which they are entering.⁴⁰ Upon closer examination, this complaint describes a multitude of related but distinct sins. One form of deception arises from the fact that the limited repair warranty takes away rights and remedies to which the purchaser would otherwise be entitled and does so in language that is not reasonably calculated to let the consumer know that this is its effect. Another form occurs when, upon receiving a complaint, the seller or manufacturer places its own interpretation on general language in the warranty that results in non-coverage. Yet a third occurs when the purchaser first realizes, either from a belated, careful scrutiny of the warranty or from the assertion of the warrantor, that a remedy will be provided only after the purchaser satisfies certain conditions, such as return of the product to a distant service center.

A second complaint that may be voiced is simply that consumers are sold shoddy goods and that the minimal warranties that are provided allow manufacturers and sellers to pass off such goods. The warranty obligation is seen as closely related to the question of product quality. If better warranties are required, this will in turn become an "enforcement mechanism" for better products.⁴¹

A closely related complaint is that while a line of goods in the aggregate may not be shoddy, the manufacturer still takes too little responsibility to see that goods in individual cases measure up to a reasonable standard.⁴² The "aggregate" view taken by the manufacturer or seller is no consolation to the individual consumer whose item, perhaps atypically, is inferior. While the manufacturer or seller can spread this loss, consumers usually cannot. This is especially true when

40. Statement of the Federal Trade Commission, 40 Fed. Reg. 60,168-70 (1975); Rothschild, *The Magnuson-Moss Warranty Act: Does It Balance Warrantor and Consumer Interests?*, 44 GEO. WASH. L. REV. 335, 343-44 (1976).

41. This problem is recognized implicitly in the statement of Congressman Moss in support of the Act, who also asserts the linkage between product reliability and warranty coverage:

Perhaps one of the potentially most important and long range effects of this bill resides in its attempt to assure better product reliability. The bill . . . attempts to organize the rules of the warranty game in such a fashion as to stimulate manufacturers, for competitive reasons, to produce more reliable products. This is accomplished using the rules of the marketplace by giving the consumer enough information and understanding about warranties so as to enable him to look to the warranty duration of a guaranteed product as an indicator of product reliability.

119 CONG. REC. 972 (1973). See also H.R. REP. NO. 93-1107, 93d Cong., 2d Sess. 26-27 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7702, 7709 [hereinafter cited as HOUSE REPORT, with citation to pages in CONG. & AD. NEWS].

42. See HOUSE REPORT, *supra* note 41, at 7709-10.

the purchase is a major one for which the consumer only enters the market occasionally. Here the warranty is valued chiefly for its risk spreading function. The basic argument is that selling products with larger insurance policies that more nearly coincide with the purchaser's expectation as to the product's average reasonable life and function is a more rational means of selling and should be encouraged or enforced.

A fourth complaint is that warrantors do not make sufficient efforts to ensure that complaints will be promptly resolved and remedies provided.⁴³ Sometimes this complaint is directed at lack of coordination between warrantors and sellers, so that consumers are shunted back and forth on an ad hoc basis. Related to this failing is the failure of warranties to describe accurately the steps a consumer should take in lodging a complaint. And sometimes the complaint is directed simply at a perceived unwillingness to live up to the terms of the warranty that has been given.

Finally, there is general agreement that courts in the past have not provided a useful forum for most consumer disputes and are not likely to do so in the future.⁴⁴ Consumer advocates and businessmen are not necessarily agreed on all the reasons for this inadequacy, but both admit it.

Not all of these deficiencies stem from the same causes, and they will not all be amenable to the same types of cure. The second and third complaints, for instance, may be rooted in the inadequacies of the substantive law itself. Through its facilitation of disclaimer and limitation of remedy, the Code contributes to the "inadequacy" of warranties given. This is also partially true of the first complaint: because Code rules governing disclaimer of implied warranties do not require language readily understandable to a consumer, warrantors do not use readily understandable language and consumers purchase in ignorance. Consumer ignorance may accentuate the second and third problems, as well, by reducing competitive pressure. On the other hand, some deficiencies recognized by consumers reflect the difficulties of enforcing existing obligations, rather than shortcomings of the law applicable to those

43. 40 Fed. Reg. 60,192; HOUSE REPORT, *supra* note 41, at 7709-10.

44. Jones, *Wanted: A New System for Solving Consumer Grievances*, 25 ARB. J. 234 (1970); Jones & Boyer, *Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies*, 40 GEO. WASH. L. REV. 357 (1972); Whitford, *Automobile Warranty*, *supra* note 22, at 1096; Note, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657 (1969).

obligations. This is true by definition of the fifth problem above; but inaccessibility of remedy also plays a major part in the first and fourth types of complaint.

II. THE MAGNUSON-MOSS ACT

Against this background, the Magnuson-Moss Act⁴⁵ may now be examined and its likely effects upon previous modes of warranty behavior assessed. Three principal requirements of the Act will be discussed: requirements for disclosure of written warranty terms and the pre-sale availability of such warranties; requirements for designating written warranties as "full" or "limited" and for minimum federal standards for full warranties; and requirements directed at improving the remedies available to consumers. Taken together, these requirements were intended to attack the five types of problems just outlined.

Two general points should be stressed at the outset. First, the Magnuson-Moss Act does not require anyone to warrant anything. The Act is unequivocal.⁴⁶ What it does do is prescribe certain disclosures that must be made by those who do warrant goods⁴⁷ and impose certain effects upon some types of warranties, if warrantors do choose to use them.⁴⁸ Competitive pressures are relied upon to induce warrantors to use types of warranties that will subject them to the Act's requirements.⁴⁹

Second, the relation of the Act to state law requires some clarification. Federal jurisdiction to deal with the problem of consumer warranties is predicated on the commerce clause; the statutory exercise of this jurisdiction is broad enough to include nearly all significant consumer transactions, so that exclusion of products below a certain cost figure becomes the effective limitation.⁵⁰ The Act, however, supplements, rather than replaces, state law in most instances. It specifically provides that "[n]othing in this [Act] shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law."⁵¹

45. 15 U.S.C. §§ 2301-2312 (Supp. V 1975).

46. *Id.* § 2302(b)(2).

47. *Id.* §§ 2302-2303.

48. *Id.* §§ 2304, 2308.

49. See remarks of Rep. Moss at note 41 *supra*.

50. See the statutory definitions of "distributed in commerce" and "commerce." 15 U.S.C. § 2301(13)-(14) (Supp. V 1975). Jurisdiction to entertain private actions brought under the Act will usually lie within an appropriate state court. *Id.* § 2310(d)(1). Regarding the availability of a federal class action under the Act, see note 118 *infra*.

51. *Id.* § 2311(b)(1).

Possible effect upon state law respecting personal injury or consequential damage is also carefully limited.⁵²

A. *Disclosure of Terms of Warranty*

One principal goal of the Magnuson-Moss Act is "to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products"⁵³ To that end, the Act provides that "any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by the rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty."⁵⁴ The Commission has already adopted rules governing the disclosure of warranty terms⁵⁵ and the steps that warrantors and sellers must take to insure the availability of written warranty terms to the purchaser prior to sale.⁵⁶

1. Scope of Coverage

In order to understand the scope of the disclosure provision, it is necessary to understand several terms that it employs. In the Act itself, the terms "consumer" and "consumer product" are very broadly defined; for purposes of the Commission's disclosure and pre-sale availability rules, however, the statutory definitions have been narrowed, so that the transactional scope of the rules now generally coincides with the "consumer transaction" of common parlance.⁵⁷ Additionally, only transactions involving goods costing the consumer more than fifteen dollars are covered.⁵⁸

52. *Id.* § 2311(b)(2).

53. *Id.* § 2302(a).

54. *Id.*

55. 16 C.F.R. § 701 (1976).

56. *Id.* § 702.

57. The Act defines "consumer product" as "tangible personal property . . . which is normally used for personal, family, or household purposes" 15 U.S.C. § 2301 (1) (Supp. V 1975). The test is not normal use of the specific product, but of the type of product. "Consumer" is in turn defined to include "a buyer (other than for purposes of resale) of any consumer product" *Id.* § 2301(2). Under these definitions, a sale of a fleet of automobiles to Hertz would involve a sale of consumer products to a consumer. Because such purchasers do not require the protection of the Commission's rules, they have now been excluded. See 16 C.F.R. §§ 701.1(b), (h), 702.1(b) (1976).

58. 16 C.F.R. §§ 701.2, 702.3 (1976). A discussion of the Commission's decision to raise the "cut-off" figure to fifteen dollars is contained in the Commission's statement accompanying the rules. 40 Fed. Reg. 60,168, 60,171 (1975).

The most important definition for an understanding of the Commission's rules, however, is that of "written warranty." Unless the warrantor warrants "by means of a written warranty" the disclosure and pre-sale availability rules have no application. The definition of "written warranty" is contained in section 101(6) of the Act:

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 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 any 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.⁵⁹

It is evident that the first portion of this definition is modeled in part upon U.C.C. section 2-313(1)(a).⁶⁰ At the same time, it should be noted that the federal definition is considerably narrower than the Code's entire section on express warranty liability: there is no federal parallel to express warranty by description or by sample or model;⁶¹ and even if the express warranty is by promise or affirmation of fact, it must be in writing to fall within the federal definition. The second portion of the federal definition more nearly describes a term governed by U.C.C. section 2-719: an expressly agreed remedy given in lieu of all other remedies that would be available under the Code. It is usually contained, of course, as one component of a limited repair warranty. But it may also be given as part of a general statement of a manufacturer's or

59. 15 U.S.C. § 2301(6).

60. Compare the text of U.C.C. § 2-313(1)(a), *quoted in note 5 supra*.

61. It has been suggested that the first portion of the federal definition is broad enough to include warranties of description. In the exceptional case this may be so. But there are substantial grounds for rejecting a reading of the section to include, say, a description in a bill of sale. First, the section is so clearly patterned upon *id.* § 2-313(1)(a) that if the draftsmen wished to include warranties of description, it would have been natural for them also to track the language of *id.* § 2-313(1)(b). Second, the definition requires that the affirmation relate to material or workmanship and affirm that it is defect free or that it will meet a specified performance standard: this describes well the usual form of limited repair warranty, but not the usual warranty of description. Third, the legislative history indicates concern primarily with the types of formal written warranties that have been described.

seller's willingness to stand behind goods, as in a "satisfaction guaranteed or your money back" term.⁶² Although only the first of these two types of provisions falls within a strict Code definition of warranty, both fall within common parlance, and both fall within the federal definition. The federal definition is inapplicable to sales without a formal warranty since none of the warranties that may arise in such sales meet the federal definition. However, the federal definition does very clearly cover limited repair warranties.⁶³

2. Disclosures Required and Pre-Sale Availability

The purpose here is not to describe in detail all the disclosure requirements and rules regarding the pre-sale availability of warranty terms that the Commission has imposed. Such descriptions are already available but, of course, provide no substitute for simple scrutiny of the regulations themselves.⁶⁴ Instead, a brief sketch of the types of information that the Commission requires will be followed in the next section by more extensive analysis of the assumptions about consumer behavior and the nature of the consumer marketplace that underlie the requirements and the likely effect of the requirements upon that marketplace.

In general, the types of information that must be disclosed under the Commission's regulations fall into two broad categories. The first of these is information that describes the actual quantum of protection that the warranty affords. Within this category, for instance, are the Commission's requirements⁶⁵ that the warranty clearly describe what parts are excluded; that the warranty indicate clearly what actions the warrantor will take in event of a defect, the items or services for which the warrantor will pay or provide and, when necessary for clarification, those items or services for which the warrantor will not pay or provide;

62. See the discussion of this form of warranty in note 18 *supra* and note 86 *infra*.

63. The definition will also cover "satisfaction guarantees," discussed in note 18 *supra*. Some of the effects of the Act upon this form of warranty are discussed in note 86 *infra*.

64. See Denicola, *The Magnuson-Moss Warranty Act: Making Consumer Product Warranty a Federal Case*, 44 *FORDHAM L. REV.* 273 (1975); Rothschild, *supra* note 40; Comment, *Commercial Law—Warranties—Magnuson-Moss Act Seeks to Promote Enforceability and Comprehensibility of Written Warranties*, 7 *RUT.-CAM. L.J.* 379 (1976); Note, *UCC § 2-702(2): An Invalid State Priority in Bankruptcy*, 33 *WASH. & LEE L. REV.* 163 (1976). In addition to the foregoing, which are largely descriptive, there is a very thoughtful Note, *The Magnuson-Moss Warranty Act: Consumer Information and Warranty Regulation*, 51 *IND. L.J.* 397 (1976).

65. 16 C.F.R. § 701.3 (1976).

limitations on duration of implied warranties, together with a statement that some states do not allow such limitations; and exclusions or limitations on consequential damages, together with a statement that some states do not allow such limitations. The second category comprises information that is primarily of interest to the purchaser in the event that the warranty is breached. This includes such matters as a "step-by-step explanation of the procedure which the consumer should follow in order to obtain performance of any warranty obligation . . . ," names and addresses of warrantors, names or titles of contact persons, information about the availability of an informal dispute settlement mechanism, and generalized statements about the possible availability under state law of greater rights than the warranty purports to give.⁶⁶ Some of these "remedial" matters may also influence the decision of the purchaser. While the two categories may overlap, they nonetheless provide a useful framework for later discussion.

If any such information is to influence a purchaser's decision, it must be available at the time of purchase. The Commission has adopted regulations designed to ensure such pre-sale availability, while at the same time preserving sufficient flexibility to take account of the many different types of products and different ways in which they are marketed.⁶⁷ The Commission's disclosure rule provides that when a purchaser is entitled to notice of the terms of the written warranty all required disclosures must be made in a single document.⁶⁸ Such disclosure constitutes notice of all required information in both categories outlined above.

3. Evaluating the Act's General Disclosure Requirements

The Act's disclosure provision states that it is directed at preventing deception and improving the adequacy of information available to consumers, that is, attacking problems that have been identified above as falling within the first problem area—incomprehensible or deceptive warranties. In the draftsmen's minds, the provision was apparently also intended to improve competition in the marketing of consumer products, thereby indirectly attacking the second and third problem areas—product reliability and adequacy of warranty.

66. *Id.*

67. *Id.* § 702.

68. *Id.* § 701.3(a).

"Deception" is a term used rather loosely to refer to several different types of problems. One problem is that many "warranties" actually *limit* consumer rights. In the words of Congressman Moss, "It is all but fraud when a guarantee declares in large print that the manufacturer is giving protection to the buyer and in the fine print attempts to take away common-law buyer protection."⁶⁹ This remark is slightly wide of the mark. "Common-law buyer protection" presumably refers to the Code's implied warranties and rights to revocation of acceptance and consequential damages. Yet fine print avoidance of implied warranties is clearly ineffective,⁷⁰ and it is probably ineffective with respect to consequential damages as well.⁷¹ This, however, speaks only to the effectiveness of such clauses when litigated in a private action. The presence of such clauses buried away in a contract may allow sellers to force abandonment of claims by disappointed purchasers who, though angered by this tactic, have no idea that the law would support them in their indignation. Attempts to bury such clauses now bring warrantors into violation of the disclosure regulation, constitute an unfair trade practice and subject the warrantor to the Commission's improved arsenal of remedies.⁷²

The theme that the limited repair warranty, in particular, is a deceptive marketing device recurs throughout the legislative history of the Act. A staff report prepared for the House states: "These certificates, often marked 'WARRANTY' and printed on good quality paper with a fancy filigree border, in many cases serve primarily to limit obligations otherwise owed to the buyer as a matter of law."⁷³ This statement is again misleading: the "obligations otherwise owed to the buyer as a matter of law" are owed only as a matter of presumable intention. If disclaimer and limitation clauses are to be attacked, the attack should

69. Washington Post, Sept. 19, 1974, § B, at 16, col. 1, *reprinted in* 40 Fed. Reg. 60,168, 60,169 (1975).

70. U.C.C. §§ 2-316(2), 1-201(10).

71. *Id.* § 2-719(3) requires that exclusion of consequential damages be conspicuous. As surprise is one aspect of unconscionability, it is easy to avoid fine print terms under this section. Some courts have put a gloss upon the section requiring exclusions to be conspicuous even in commercial transactions. *Avenell v. Westinghouse Elec. Corp.*, 41 Ohio App. 2d 150, 324 N.E.2d 583 (1974).

72. 15 U.S.C. 2310(b) (Supp. V 1975). Title II of the Act significantly expanded the Federal Trade Commission's enforcement powers. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. 93-637, §§ 205, 206, 88 Stat. 2200-02 (partially codified at 15 U.S.C. §§ 45, 57b (Supp. V 1975)).

73. STAFF OF HOUSE INTERSTATE AND FOREIGN COMMERCE COMM., SUBCOMM. ON COMMERCE AND FINANCE, REPORT ON CONSUMER PRODUCT WARRANTIES 93d Cong., 2d Sess., (1974), *reprinted in* 40 Fed. Reg. 60,168, 60,169 (1975).

focus directly on the artificiality of warranty law as a guide to consumer expectations. It is misleading to intimate that the law at any time "required" any quantum of warranty obligation.

One must also be cautious in asserting that the limited repair warranty is misleading because it purports to give, while it actually takes away. The limited warranty not only purports to give, it does give: narrow as the repair obligation that is taken on may be, it is not an obligation that a seller would otherwise have. Even if a buyer were to comprehend fully the extent of common law protection, he *might* regard the express promise of the warrantor as a "better deal." A limited repair warranty is, among other things, an internal directive to the bureaucracy that administers warranty service.⁷⁴ If a warrantor is willing to agree to a lesser obligation and attempts to abide by it, this may be worth more to the buyer than his somewhat hypothetical rights under an implied warranty by which the seller has not indicated a willingness to abide. The remedies that are statutorily provided require, in usual circumstances, litigation to compel a recalcitrant warrantor; but court action has been a singularly ineffectual goad to warrantors in the past.⁷⁵

It should be emphasized that what the limited repair warranty takes away is not necessarily something that the buyer believed that he would obtain.⁷⁶ Thus, the "deceptive" character of a limited repair warranty largely stems from the consumer's ignorance about the warranty protection accorded by law when no express provision is made. Of course, this ignorance allows marketing that may give an undeserved competitive effect: consumers may elect to purchase goods sold with a limited repair warranty with the mistaken expectation that they are getting fuller protection than with goods sold "unwarranted," but which, in fact, carry the Code's implied warranties and full array of remedies.

74. Cf. Whitford, *Automobile Warranty*, *supra* note 22, at 1040-42, 1094 (analyzing warranty performance among automobile dealers in terms of bureaucratic directives).

75. *Id.* at 1039, 1094, 1096.

76. We leave aside here, as elsewhere in the article, the issue of personal injury and property damage, which is more appropriately dealt with under tort concepts. Although the limited repair warranty avoids consequential economic loss, it is doubtful that most consumers expect this protection. A closer question is whether the consumer purchaser does not have an irreducible core expectation about the goods' performance: an expectation of "merchantability," in Code terms. Query: it is true that the purchaser of a television set sold with a ninety-day warranty does expect the set to last longer than ninety days. But does he expect that the manufacturer takes on more than the obligation to repair within the warranty period, leaving the purchaser to "take his chances" thereafter? Our thinking about this question has probably been corrupted by the need to stretch warranty concepts prior to the adoption of strict tort concepts in order to recompense personal injury.

If, however, sellers using a limited repair warranty are gaining an unfair competitive edge over those selling subject to implied warranty liability, the latter group of sellers has been remarkably remiss in fighting this competitive effect. By hypothesis, this competitive edge is due to buyers' ignorance; one would expect some effort to dispel this ignorance by the class of sellers adversely affected. This has not been the case. It is not difficult to deduce the reason: on the whole, products generally sold with limited repair warranties compete with other manufacturers' similar products also sold with limited repair warranties. No major automobile manufacturer, for instance, sells with anything other than a limited repair warranty. Whether or not the "deception" produced by non-disclosure is as obnoxious as Congress believes, it is ameliorated under the Act. This is, however, primarily because the Act precludes any warrantor from offering a written warranty that disclaims implied warranties,⁷⁷ not because of the Act's disclosure requirements.

Labeling warranties as "deceptive" may also simply represent a more pejorative way of stating another problem the legislation identifies: warranties do not convey information to consumers "adequately." Implicitly, the Act identifies two related sources of this "inadequacy." Warrantors may withhold some information entirely, or they may disclose information, but in such a confusing manner as to mislead the consumer. The new forms of warranty that are now appearing in compliance with the Act do seem somewhat clearer than their predecessors. For instance, some warrantors appear now to identify with greater specificity parts that are or are not covered, rather than to rely upon generic descriptions of the "types" of parts covered or not covered. Requiring greater specificity may bring internal or informal interpretations of the warranty bureaucracy into closer conformity with the written warranty. This is desirable, if for no other reason than that it reduces surprise (deception?); a purchaser who always realized that a particular part was not covered will feel less aggrieved when, indeed, it is not covered.

But the Act holds out the prospect of far greater consequences from such clarity. Clarity will promote comparison; comparison will increase competition in warranties; competition in warranties will lead to more extensive warranties and, in turn, to greater product reliability.

77. 15 U.S.C. § 2308 (Supp. V 1975). A warrantor giving a "limited" warranty may limit the duration of implied warranties to coincide with the duration of the express warranty; a warrantor giving a "full" warranty may neither disclaim nor limit the duration of implied warranties. *Id.* §§ 2304(a)(2), 2308(b). This point is discussed more fully in the text accompanying notes 20-27 & 30 *supra*.

Thus, the disclosure regulations are also intended as an attack upon the problems of inadequate warranties and product reliability. An appraisal of the Act must turn upon a consideration of this grander set of propositions.

We may start by asking why there has been a lack of clarity about warranty terms. Information is not lacking about the styling features of automobiles nor, for many years, about the size of the largest engine available nor, currently, about the gas mileage available. Presumably, manufacturers hawk their goods on this basis because they believe it is useful to sales. To the extent that they have failed to hawk goods on the basis of warranty, presumably they have not regarded it as useful to sales or, at the very least, have not regarded it as sufficiently useful to sales (when compared with other means of increasing sales) to offset the obvious additional liabilities that would be incurred. Nothing except their own business judgment has prevented manufacturers from attempting to compete in the area of warranty.⁷⁸ Had their business judgment led them to launch such a campaign, it may be assumed that the considerable powers of advertising would have been enlisted in improving the flow of information to the consumer. Whether the power under prior law to obscure warranty information was so great that it could defeat the efforts of a diligent and persistent competitor may be doubted. As noted in Part I, there are a number of relatively objective factors that may make a particular allocation of risks attractive for a given type of product; such factors should lead the judgment of all manufacturers of that product to adopt essentially the same warranty behavior. Prior lack of clarity of warranty terms seems more likely a result than a cause of lack of vigorous competition in the area. Once warrantors have reached a decision about the allocation of risks that seems wise in a given product market, it is natural that they will try to put the best face on what they are willing to do. Warrantors cosmetically use "certificates, often marked 'WARRANTY' and printed on quality paper with a fancy filigree border"⁷⁹ to embody and disguise terms that amount primarily to a limitation of buyer's rights. Requiring greater clarity may reduce the tension created when the buyer's optimism, conceivably fostered by these certificates, is later disappointed. But this is no assurance that the substantive terms themselves will be altered to the buyer's advantage.

78. See remarks of Rep. Moss at note 41 *supra*.

79. REPORT ON CONSUMER PRODUCT WARRANTIES, *supra* note 73, at 40 Fed. Reg. 60, 169.

At least a partial explanation for the lack of clarity in warranty terms is found in a lack of interest in competition, rather more than the other way around as the Act supposes. But the assumption that, whatever the causes of lack of competition, disclosure will create competition, should also be examined. In this view, the current setting involves a vicious circle, in which the lack of competition allows the lack of clarity that promotes the lack of competition. The objections above attacked the proposition that the circle was so tight that it could not have been broken by a truly desirous competitor. But one may also attack directly the proposition that requiring the warrantor to provide information will foster competitive demand among consumers.

One basis for skepticism about the effects of disclosure requirements involves the type of information required to be disclosed. Currently, a warranty usually states its duration, as it must under the Act.⁸⁰ So, to the extent that warrantors wish to compete, they may do so by varying the basic period of warranty coverage; but warrantors have competed on this level in the past.⁸¹ It is true that duration is only one aspect of warranty coverage. A warranty may be longer but more restricted and, hence, afford less "total protection." In theory, by requiring improved clarity, federal regulations will enable better evaluation of such matters by the consumer. A consumer will not be "deceived" by the longer warranty. Yet in practical terms, how is the average consumer to form an intelligent opinion about whether a twelve thousand mile warranty covering clutch facings but not brake shoes is "better" or "worse" than a twelve thousand mile warranty covering brakes but not the clutch? In short, clarity can improve the information that a consumer receives, but it has no effect at all on the information-handling capacity of the recipient. And one of the consistent problems of the marketplace may well lie in the fact that most consumers simply could not digest full data if it were presented to them.⁸² A related problem is that to be used intelligently, the information that is provided would have to be coupled with information that is not required.⁸³ For instance, what is the relative frequency of malfunction, the relative time required for repair and the relative cost of repair of clutches and

80. 16 C.F.R. § 701.3(a)(4) (1976).

81. HOUSE REPORT, *supra* note 41, at 7708.

82. Cf. Whitford, *Automobile Warranty*, *supra* note 22, at 1047-60 (warranty quiz given to car buyers).

83. Note, *The Magnuson-Moss Warranty Act: Consumer Information and Warranty Regulation*, 51 IND. L.J. 397, 401-11 (1976).

brakes respectively? This information bears on the relative desirability of our two hypothetical warranties: none of it is required, and most of it is available to the consumer only in the grossest form from other sources.

Some required warranty terms undoubtedly will be quite understandable to the consumer. For instance, the warrantor is required to state not only parts covered, but also conditions to be imposed and expenses that the consumer will bear. Certainly most consumers can readily understand the difference between a warranty that requires the consumer to send the goods to a factory and covers only parts and one that promises on-premises repair and covers parts and labor. What is much less clear is whether a consumer is going to be faced with many such comparisons within a given product line. Just as a warrantor's choice of a limited repair warranty usually reflects the nature of the product, the decision regarding mode of servicing is dependent on the characteristics of the product and the factors are essentially the same for each manufacturer of that product. Thus, automobiles are serviced through franchised dealers, small appliances at service centers and so on. This pattern of variance of warranty terms reflects in part characteristics of the goods such as their mobility. It is obvious that the warranty remedy will be designed to reflect the manufacturers' needs, such as requiring a purchaser to have the goods serviced at an "appropriate" locale. It would be silly to think that automakers would regard a warranty that provided for "house calls" as an enticing form of competition.

When the disclosure regulations are viewed as a whole, it seems unlikely that the information required will spark important changes in the competitive structure of consumer warranties. That is not to say that the disclosure regulations are of no value. They may make it clearer to consumers at the outset what they are not entitled to. And this may have a beneficial social effect of diminishing the incidence of disappointed expectations, even if the actual protection afforded is not measurably increased. And clarifying coverage may indirectly improve delivery of warranty services. Whether these lesser benefits are worth the costs imposed by the regulations is a more difficult question.

B. Minimum Federal Standards for Warranty

The Magnuson-Moss Act seeks to increase competitive pressures and then to rely upon these pressures to upgrade the types of warranty

offered. The disclosure requirements just considered are only one of the means by which the Act hopes to stimulate competition. A second means is the introduction of "minimum federal standards for warranty."⁸⁴ "Minimum federal standards for warranty" should be understood within the context of the Act's voluntarism: the standards are the minimum that a warrantor must provide, if he wishes to designate his warranty as a "full warranty"; if he does not wish to designate his warranty as "full" or does not wish to extend a written warranty at all, he is free to ignore these minimum standards. The only requirements he will then face are designation of any written warranty he does give as a "limited warranty" and compliance with the Act's disclosure regulations.⁸⁵ Evidently, the "full" and "limited" labels are intended to create a bright line that consumers will be able to recognize clearly and, thus, to meet objections voiced about the minimal competitive effect to be expected from the disclosure rules.

Sales without a formal warranty do not come within the provisions, since they do not entail a written warranty. Limited repair warranties, however, will come within the provisions and, depending on their scope, they may or may not satisfy the minimum federal standards. In theory, a bright line will be established between limited repair warranties that meet the federal standards and all warranties that do not. In practical terms, however, the most important bright line that will be created will be between limited repair warranties that are "limited" in the federal sense and those that comply with the federal standards and may be designated "full."⁸⁶

It is the evident hope of Congress and the Commission that competitive pressures will lead growing numbers of warrantors to designate their warranties as "full warranties." Once they do so, they become subject to the minimum federal standards for warranty detailed in section 2304. But how onerous are these standards? This can best be

84. 15 U.S.C. § 2304 (Supp. V 1975).

85. *Id.* § 2303.

86. Sales with a satisfaction guarantee, *supra* note 18, will come within the section, since they may entail a written warranty. Query whether the "satisfaction guarantee" meets the minimum requirements for a "full" warranty, discussed more fully in the text following. Arguably it does, since there is no modification of implied warranties nor limitation of consequential damages. Perhaps there is a question regarding the seller's repair duty. In any event, the question may not have great practical importance: "satisfaction guarantees" are usually used on different product lines from limited repair warranties for reasons discussed in note 18 *supra*, and thus do not "compete with" limited repair warranties. See also text following note 87 *infra*.

established by comparing them with the existing case law under the Uniform Commercial Code.

1. Effect on Implied Warranties

One of the effects of giving a "full warranty" is that the warrantor is no longer free to disclaim or limit the duration of implied warranties.⁸⁷ This provides no change at all from the situation where the seller sells goods without warranty or disclaimer. It does provide a change from the effect previously accorded the limited repair warranty, and it is at this type of provision that the prohibition against disclaimer was especially aimed.

Under pre-Act marketing patterns, one would not expect competition between one manufacturer selling a given product line with a limited repair warranty and other manufacturers selling the same product subject to implied warranties or on a satisfaction guaranteed basis. This is probably because the nature of the goods sold recommends the general form of limited repair warranty employed, as suggested above. Such warranty competition as exists takes the form of altering the exact coverage that the warranty affords and the duration for which it is extended. So long as the considerations that stem from the nature of the goods themselves remain constant, we should not expect material changes in the nature of warranty given to occur voluntarily.

Following the Act, of course, a new possible form of competition is created and encouraged: competition between "limited" limited repair warranties and "full" limited repair warranties. Although a warrantor cannot possibly *disclaim* implied warranty liabilities altogether, he can limit the duration of such warranties to the duration of the warrantor's express warranty if he is willing to designate the warranty "limited." Such limitation is unavailable if the warranty is designated "full." By making the "full" warranty easily distinguishable, the Act may have made it attractive enough from a marketing viewpoint to induce some warrantors to forgo the opportunity of limiting implied warranties.

2. Imposing Charges or Conditions

A second requirement of the "full" warranty is that "such warrantor must as a minimum remedy such consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or

87. 15 U.S.C. § 2304(a)(2) (Supp. V 1975).

failure to conform to such written warranty."⁸⁸ At first glance, this seems to say little more than that a warrantor shall abide by his warranty. The words "without charge," however, hold out some prospect of relief from the "hidden charge" warranty, under which the warrantor will replace the fifty-cent part "free" if the buyer will pay the \$37.50 labor charge.⁸⁹ Section 2304(b)(1) seeks to eliminate further the possibility for defeating the apparent scope of warranty protection by prohibiting warrantors offering a "full" warranty from imposing any condition other than notice as a condition of securing remedy.⁹⁰ Both these provisions are hedged, however. The warrantor can impose such further conditions as he wishes if he can satisfy a factfinder that the duty imposed is a reasonable one.⁹¹ And the Act elaborates upon the term "without charge," stating that "the warrantor may not assess the consumer for any costs the warrantor or his representatives incur in connection with the required remedy" but the Act "does not necessarily require the warrantor to compensate the consumer for incidental expenses."⁹² Although these two provisions would seem to rule out the type of gross labor charge exacted in the example given above, their application to

88. *Id.* § 2304(a)(1).

89. *Id.* § 2304(d).

90. *Id.* § 2304(b)(1) provides:

In fulfilling the duties under subsection (a) of this section respecting a written warranty, the warrantor shall not impose any duty other than notification upon any consumer as a condition of securing remedy of any consumer product which malfunctions, is defective, or does not conform to the written warranty, unless 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.

91. *Id.* The Commission faces a dilemma in administering this provision. To the extent that it allows such conditions, it tends to degrade the bright line established between "limited" and "full" warranties. To the extent that it does not, it dissuades any warrantor from offering "full" warranties. The problem would be lessened if one set of labels were not to form the dividing line for warranties on all types of products. This point is discussed more fully in the text accompanying notes 85-86 *supra*.

92. *Id.* § 2304(d) provides:

For purposes of this section and of section 2302(c) of this title, the term "without charge" means 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. An obligation under subsection (a)(1)(A) of this section 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.

"Incidental" damages are not defined, an oversight that may pose interpretative questions as to recovery of expense items when repair fails. See note 99 *infra*,

less clear-cut cases has provided a great deal of uncertainty among warrantors, and may account for much of the current warrantor reluctance to employ "full" warranties. How, for instance, will conditions such as requiring the buyer to ship or present the goods at a given service center be treated? Such conditions may be entirely reasonable or grossly unfair depending on circumstances: return of a defective watch to a service center, for instance, versus return of a defective boat hull to a factory on the opposite coast.

3. Limitation of Remedy

The third and fourth characteristics of the "full" warranty may conveniently be treated together:

(3) such warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty; and

(4) if the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part (as the case may be). The Commission may by rule specify for purposes of this paragraph, what constitutes a reasonable number of attempts to remedy particular kinds of defects or malfunctions under different circumstances. If the warrantor replaces a component part of a consumer product, such replacement shall include installing the part in the product without charge.⁹³

The ability of the warrantor to exclude consequential damages under the above provision is subject only to a formal requirement—that the limitation be conspicuous. The Code requires that such exclusions be conspicuous—a requirement that may easily be read as including a formal requirement similar to the federal Act, but that may also impose substantive limitations upon the parties' freedom of contract.⁹⁴ Thus far, however, so long as economic loss rather than personal injury is involved and so long as exclusion provisions are not tucked away in fine print, courts have shown little inclination to invalidate exclusions of consequential damages, even in consumer transactions. Thus, the federal

93. 15 U.S.C. § 2304(a)(3)-(4) (Supp. V 1975).

94. J. WHITE & R. SUMMERS, *supra* note 33, at 112-33, 384-86.

minimum standard seems in this regard to provide the same degree of protection that the Uniform Commercial Code does.⁹⁵

The fourth requirement, that if the warrantor is unable to effect repair within a reasonable time he must allow the buyer to elect refund or replacement, also does not go beyond the better case law under the Code.⁹⁶ Indeed, although it reaches its result with greater clarity, it does not go so far as existing case law in some respects. For example, when a limited remedy is avoided under the Code because it has failed of its essential purpose, there is some confusion in the case law about whether the buyer, who is now entitled to a "remedy as provided in this Act," may recover consequential damages despite a further clause excluding them.⁹⁷ In at least some cases, consumers have been allowed such damages, although the warrantor had tried faithfully to comply with the repair obligation.⁹⁸ It may be that some such damages will also be held recoverable under the Act, not as "consequential" damages, but as "incidental" damages.⁹⁹

In sum, the third and fourth "minimum federal standards for warranty" that apply when the warrantor has given a "full" warranty seem to be generally in accord with the results obtainable through a thoughtful application of the Uniform Commercial Code. So far as the substance of the obligation imposed, the federal legislation, if it embodies any improvement at all, does so principally because it is a clearer

95. The Commission has also indicated that it will attack "limited" warranties that contain inconspicuous limitations on consequential damages as "deceptive," utilizing its powers under 15 U.S.C. § 2310(c) (Supp. V 1975). 40 Fed. Reg. 25,723 (1975). The federal requirement will in no event reduce the requirements imposed under the Code as a matter of state law. 15 U.S.C. § 2311(b)(2) (Supp. V 1975).

96. See cases cited note 39 *supra*.

97. *Compare* County Asphalt, Inc. v. Lewis Welding & Eng'r Corp., 323 F. Supp. 1300 (S.D.N.Y. 1970), *aff'd on other grounds*, 444 F.2d 372 (2d Cir. 1971), *with* Koehring Co. v. A.P.I., Inc., 369 F. Supp. 882 (E.D. Mich. 1974).

98. *E.g.*, *Beal v. General Motors Corp.*, 354 F. Supp. 423 (D. Del. 1973).

99. Although 15 U.S.C. § 2304(3) (Supp. V 1975) validates exclusions of consequential damages when done conspicuously, *id.* § 2304(d) provides that the warrantor may be responsible for the consumer's incidental damages when remedy is not made within a reasonable time, or the warrantor imposes an unreasonable duty upon the consumer as a condition of securing remedy. Whether such items as rental of a replacement vehicle are "consequential" or "incidental" within the meaning of these provisions will have to await interpretation. The desired interpretation would be to allow such damages; this provides a necessary sanction that may dissuade warrantors from engaging in wilfully wrongful behavior. *Cf.* Eddy, *supra* note 39, at 84-88 (court may also choose to avoid the question by finding no failure of purpose, or by giving independent effect to the clause excluding consequential damages).

statement of a warrantor's obligations.¹⁰⁰ At the same time, it should not be overlooked that the *sanctions* for failure to abide by these obligations are considerably different under the Act. The only sanction for failure to abide by the obligations imposed by the Code is a private action by the buyer. In contrast, failure to abide by an obligation imposed by the Act is an unfair trade practice and submits the warrantor not only to the possibility of a private enforcement action, but to a broad range of penalties, civil and criminal, by the Federal Trade Commission.¹⁰¹ Despite the oft criticized inadequacy of enforcement by the Commission, which should be ameliorated by the increased flexibility and power it will enjoy under the provisions of Title II of the Act,¹⁰² Commission enforcement, or the prospect of it, can have a significant effect far out of proportion to the actual number of actions taken. This is due to the dominance in the consumer marketplace of large, stable and relatively responsible manufacturing firms that are well counseled and may be expected to eschew conflict with the Commission. Among such firms, a high degree of self-enforcement is to be expected. To date, the incidence of "limited" warranties suggests, if anything, an excess of caution on the part of counsel.

4. Limited Efficacy of the "Labeling" Approach

The basic concept of the "minimum federal standards for warranty" seems quite sound. As the critique of the disclosure regulations argued, consumers' capacity to digest information may be limited. Adoption of "bright-line" labels, coupled with a standard content, is an appropriate response to this problem. Yet implementation of the concept in the Magnuson-Moss Act seems deficient. One label is used to cover too many variables. Some warrantors may not wish to impose

100. The Commission is empowered to specify by rule "what constitutes a reasonable number of attempts to remedy particular kinds of defects or malfunctions under different circumstances." 15 U.S.C. § 2304(a)(4) (Supp. V 1975). To date it has not done so. To the extent that lack of clarity existed under the Code due to the novelty of U.C.C. § 2-719(2) and the paucity of cases applying it, the Act itself will provide clarity. But to the extent that uncertainty inheres in the great diversity of consumer products and their defects, the Commission faces a difficult task formulating prospective rules which are both fair and certain.

Lemon rules are not a short term prospect. The Commission is considering the necessity of contracting out a study of the form that such rules might feasibly take. Telephone interview with Lawrence Kanter, Staff Attorney, Bureau of Consumer Protection, Federal Trade Commission (March 10, 1976).

101. 15 U.S.C. § 2310(b) (Supp. V 1975).

102. See HOUSE REPORT, *supra* note 41, at 7711-16.

any condition upon the availability of remedy, but may shy away from giving a merchantability warranty of indefinite duration. For others, the problem may be that while they will extend a merchantability warranty, they will not take responsibility for labor charges. By cumulating the minimum requirements, a warrantor with fears about any one of them is dissuaded from offering a "full" warranty. And without some cadre of "full" warrantors, the competitive pressures that are intended to develop remain dormant. If the disclosure regulations were able to fill this void so that competition among "limited" warranties were meaningful, the deficiency would not be severe. The probable inability of the disclosure regulations to achieve this end has been noted, however.

Further provisions of the Act suggest means by which the Commission might mitigate the deficiencies of the current disclosure and labeling requirements. One allows the Commission to devise by rule "detailed substantive warranty provisions which warrantors may incorporate by reference in their warranties."¹⁰³ Using this power, the Commission may follow the same "bright line" approach that represents the positive aspect of the labeling provisions. Flexibility is achieved at the same time, allowing the bright line established to be one that has particular importance for the product line involved. The Commission could utilize this power to establish "yardstick" warranties, as well. However, the Commission has not as yet used this approach; its reluctance may be due to fears that "incorporation by reference" can work unfairly to the consumer. Of course, such incorporations *can* work unfairly; the real issue is whether they necessarily do so. Under this approach the Commission controls the warranty terms to be incorporated, which is very different from and preferable to leaving the warrantor free to incorporate one-sided terms by reference. Furthermore, a view that places much emphasis upon the formal contract as the basis for consumer expectations is unrealistic.¹⁰⁴ An advantage of "standard" federal terms is that the considerable powers of consumer groups, as well as advertising, could be used to educate consumers about the exact content of the "standard" warranties.

Another provision of the Act that is designed to ameliorate inadequacies in the disclosure and labeling requirements and that calls for

103. 15 U.S.C. § 2302(d) (Supp. V 1975).

104. Cf. Whitford, *Disclosure Regulation*, *supra* note 23, at 425-26 (precontract disclosure regulation is generally not an effective aid to consumer awareness).

thoughtful application is the Federal Trade Commission's power to regulate the manner in which advertising presents warranty information.¹⁰⁵ The extent to which the Commission makes creative use of these powers could have a substantial effect on the impact of the Act, an impact that may only be assessed over a long period of time.

C. Improving the Remedies Available to Consumers

A third major thrust of the Magnuson-Moss Act is to improve the remedies available to consumers when goods fail to conform to the warranted standard or when warrantors refuse or are unable to provide agreed remedies. One aspect of this has already been mentioned: the prospect of enforcement actions by the Commission may be expected to cause many warrantors to scrutinize and perhaps to revamp their warranty procedures. In the process, some improvement may occur simply by virtue of the fact that warrantors are forced to think through their practices. The ease with which warrantors may continue without any change, however, simply by designating their warranties as "limited" and redrafting their documentation to comply with the Commission's disclosure rules, undercuts the reliance that can reasonably be placed on this effect of the legislation. Additionally, Commission enforcement is particularly appropriate to combat noncompliance in documentation or other practices that are generic; but this mode of enforcement is ill-adapted to obtaining relief in individual cases where a proper result turns upon peculiar facts. Here, of necessity, the enforcement burden must continue to rest with private individuals. Since individualized disputes of this kind probably make up the bulk of consumer litigation, and since existing patterns of litigation have proven so inadequate in meeting consumer needs, attention should also be given to the Act's innovations for improving private relief.

A consumer complaint, noted earlier, is that warrantors do not make sufficient efforts to ensure prompt resolution of disputes. An aspect of this problem is the "run-around" purchasers sometimes encounter when they attempt to secure remedies under a warranty. Consumer complaint handlers note the incidence of "drop-outs" during early stages of complaint investigation.¹⁰⁶ There is insufficient data available accurately to assess the reasons for "drop-outs." They may be supposed

105. See 15 U.S.C. § 2302(b)(1)(B) (Supp. V 1975).

106. See 40 Fed. Reg. 60,200 (1975).

to stem in part from the abandonment of weak claims, but they may stem at least equally from the ease with which many consumers lose heart. Certainly the existence of uncertainty about the proper avenues to follow in seeking redress may be expected to contribute to abandonment of meritorious complaints. At this first level of remedial activity, the Act may effect some improvement. Warrantors are required to indicate clearly the steps that a consumer must follow to obtain his remedy;¹⁰⁷ again, this may not only improve consumer awareness, it may increase the degree of warrantor planning. And secondly, while warrantors may designate representatives to perform their duties under a warranty, the warrantor must provide for adequate compensation to such representatives.¹⁰⁸

A second complaint, also noted earlier, is the lack of effective access to remedies. In part the problem is the lack of consumer awareness of the legal redress that is available. In its original proposed disclosure regulations, the Commission made some minimal efforts to deal with the latter problem. But the difficulty of dealing accurately and specifically with the legal effects of warranties on products that would be sold in fifty jurisdictions forced an almost complete retreat by the Commission.¹⁰⁹ And even when consumers have awareness of the possibility of legal redress, they lack effective access to the courts or legal counsel when only small sums are in controversy. The problem of delivery of legal services to low and even moderate income groups is pervasive, and no solution is to be expected in a single piece of consumer legislation. The Magnuson-Moss Act does struggle with the issue, however, and offers two familiar solutions and one new one. The familiar devices are a provision for attorney's fees for consumer plaintiffs who prevail¹¹⁰ and a class-action provision.¹¹¹ The newly proposed solution is the "informal dispute settlement mechanism."

Section 110(a)(1) states: "Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consum-

107. 16 C.F.R. § 701.3(a)(5) (1976).

108. 15 U.S.C. § 2307 (Supp. V 1975). This provision, if skillfully enforced by the Commission, could have a significant effect on warranty service. Low-quality warranty repairs may result from the fact that manufacturers' reimbursement schedules are too skimpy, causing servicing dealers to lose money on such work. See the discussion of reimbursement schemes of the major automobile manufacturers in Whitford, *Automobile Warranty*, *supra* note 22, at 1016-21.

109. See 40 Fed. Reg. 60,176-78 (1975) for a comparison and discussion of the proposed and final disclosure regulations.

110. 15 U.S.C. § 2310(d)(2) (Supp. V 1975).

111. *Id.* § 2310(d)(3).

er disputes are fairly and expeditiously settled through informal dispute settlement mechanisms."¹¹² Like the other provisions of the Act, the sections dealing with informal dispute settlement mechanisms seek to encourage voluntary private behavior rather than require it. Congress, however, does not create such mechanisms nor does it authorize the Commission to do so. Private parties are not required to create such mechanisms or to avail themselves of those that may exist. Instead, the Act authorizes the Commission to prescribe by regulation minimum requirements for informal dispute settlement mechanisms. And only dispute settlement mechanisms that comply with these regulations may be embodied in the terms of a written warranty. An incentive for the incorporation of a complying dispute settlement mechanism in a written warranty is provided by deferring the availability of civil action under the Act pending resort to the dispute settlement mechanism.¹¹³

However fine an idea the informal dispute settlement mechanism may be,¹¹⁴ it must be recognized that to date not a single such mechanism has been established.¹¹⁵ This discouraging state of affairs requires a slightly longer look at Congress' carrot-and-stick approach. To begin with, the "stick" that threatens is not too impressive. The effect of incorporating a mechanism is not to bar suit, but only to defer it.¹¹⁶ Secondly, the suit that is deferred is only a cause of action arising under the Act; the consumer remains free to pursue any action available under state law.¹¹⁷ As has been seen, in a great many instances, perhaps most, the substance of the federal law is no greater than that of state

112. *Id.* § 2310(a)(1).

113. *Id.* § 2310(a)(3).

114. See the very favorable discussion of the informal dispute settlement mechanism concept in Rothschild, *supra* note 40, at 368-78.

115. At the present time, one group, the Warranty Review Corporation, has ascertained informally that its structure and procedures are in compliance with the regulations. The Warranty Review Corporation does not represent efforts by existing manufacturers; it is an entrepreneurial venture that will seek to market its services to one or more "clients" for incorporation in the clients' warranties. It is not currently functioning. A second group, the Home Owners' Warranty Corporation, is functioning; it has obtained an extension of time from the FTC to bring its complaint handling procedures, in so far as they relate to consumer products, into compliance. Previously, HOW had indicated that compliance would be "really difficult." *BUS. WEEK*, Aug. 2, 1976, at 65. The FTC has also had some preliminary discussions with the Better Business Bureau, discussing the possibility of qualifying bureaus. Earlier, the Better Business Bureau had indicated a lack of interest, since "there is no interest on the part of business." *Id.*

116. 15 U.S.C. § 2310(a)(3) (Supp. V 1975).

117. *Id.* § 2311(b)(1).

law. The single most significant exception may be the availability of attorney's fees under the federal act, although to the extent that progress is made in delivery of legal services to those of modest circumstances, this distinction will also be reduced in importance. Class action, which might once have provided the greatest threat, is subject to special restrictions under the Act,¹¹⁸ as well as to the limiting effects of recent federal decisions.¹¹⁹

With this somewhat ineffectual threat in the background, the Commission would have to provide a fairly tempting "carrot" to induce much warrantor action. It has not done so. The originally proposed regulations for informal dispute settlement mechanisms drew heavy criticism from industry spokesmen.¹²⁰ Although the final regulations contained a number of affirmative responses to these criticisms, the failure of any warrantor to incorporate such a mechanism speaks volumes about the attitude toward the present regulations.¹²¹ Of course, criticism of the regulations from the business community is hardly unexpected; why, it might be asked, should it really be heeded if the regulations that are finally adopted are fair and reasonable ones? But here a feeling pervades that much of the discussion about the character of the regulations seems far removed from any appreciation of the actual leverage, or lack of leverage, with which the Act provides the Commission. Of what use are the most technically perfect and fair-minded procedures, if they remain one more unread page of the C.F.R., utilized by no one?¹²² In sum, the need for cheaper, more accessible settlement mechanisms, which may be the most pressing aspect of the consumer warranty problem, remains unfulfilled.

III. SOME GENERAL QUESTIONS POSED BY THE MAGNUSON-MOSS ACT

The Magnuson-Moss Act was many years in the making. Some of the changes that the proposed legislation underwent pose interesting

118. A class action is allowed in federal court under the Act only if: (1) there are at least 100 named plaintiffs; (2) each individual claim is for \$25 or more; (3) the total amount in controversy is \$50,000 or more. *Id.* § 2310(d)(3).

119. *E.g.*, *Eisen v. Carlisle*, 417 U.S. 156 (1974).

120. *See* 40 Fed. Reg. 60,190 (1975).

121. *See also* BUS. WEEK, Aug. 12, 1976, at 65.

122. I am perplexed by such a staunch consumer advocate as Professor Rothschild, who details for ten pages the virtues of the dispute settlement mechanism concept and the Commission's rules, noting in one passing sentence the current non-existence of any qualifying mechanism. Rothschild, *supra* note 40, at 368-78.

questions about other forms the Act might have taken. Federal concern with the problem of warranties first focused upon the automobile industry.¹²³ Yet even early legislative proposals broadened coverage to include mechanical and electrical appliances.¹²⁴ As ultimately enacted, coverage extended to "consumer products actually costing more than \$5."¹²⁵ One might quibble about what dollar amount represents the appropriate cut-off. But more generally, what was at stake in the decision to broaden the coverage?

At least some early proposals for federal consumer product warranty legislation involved substantive regulation of warranties.¹²⁶ A decision to broaden coverage inevitably spelled an end to this approach, for the obvious diversity of consumer products would require equal diversity of substantive standards or else standards of extreme vagueness. What never seems to have occurred to anyone is that disclosure legislation is also affected by this problem.

If one focused attention only upon the automobile industry, for instance, one would deal with a single industry, a single product, a single mode of distribution and relatively few warranty "options" with which manufacturers are likely to compete. Working with this small range of probable options, one could devise disclosure rules with specific reference to those options, to obtain the maximum bright line effect. Or, to take another example, suppose that in the television industry the two most likely competitive options are a ninety-day parts only term and a ninety-day parts and labor term. Disclosure regulations in such a case should be directed at highlighting which of these two options the warrantor has taken. Under current legislation and regulations, both of these warranties are limited warranties, and the distinction between "parts only" and "parts and labor" can be placed within a warranty document several paragraphs long and presented in no standard sequence. Indeed, the absence of any requirement of a standardized format for disclosure, despite persistent urgings by consumer groups, resulted from

123. HOUSE REPORT, *supra* note 41, at 7708-09; FEDERAL TRADE COMMISSION STAFF REPORT ON AUTOMOBILE WARRANTIES (1968).

124. See S. 2728, 90th Cong., 1st Sess. (1967).

125. 15 U.S.C. § 2302(e) (Supp. V 1975). This occurred as early as 1970. S. REP. No. 876, 91st Cong., 2d Sess. 18 (1970).

126. For instance, the Federal Trade Commission's proposed Automobile Quality Control Act would have provided minimum standards of quality, durability, and performance of new automobiles. HOUSE REPORT, *supra* note 41, at 7709.

the Commission's belief that even the standardization of *format* was precluded by the diversity of products to be covered.¹²⁷

When one turns from the Act's disclosure requirements to its remedial provisions, particularly the encouragement of informal dispute settlement mechanisms, the same considerations apply with even greater force. Manufacturing and marketing patterns of a given product allow one to gain knowledge about the types of disputes most common to the product and the scheme of distribution and servicing and to explore possibilities for informal settlements within a given specific environment. While certain characteristics of consumer disputes may be expected to cut across product lines, not all will; it is unlikely that any single form of solution will suffice. Some industries have devoted substantial efforts already to finding a better way to handle complaints; others have not. To follow a product-specific approach would entail much greater effort, no doubt, but perhaps to much greater effect. It is unfortunate that Congress did not content itself with a smaller, more manageable task as a first goal, and then build upon the experiences gained in that effort. At least some of the inadequacies of the Uniform Commercial Code in dealing with problems of the consumer stem from the difficulty in treating so many different types of transactions, commercial and consumer, in one Code. The Magnuson-Moss Act represents progress, in so far as it narrows the type of transaction and warranty provision to be governed. But consideration of the Act suggests that further specificity would still be beneficial.

Another disturbing aspect of the Magnuson-Moss Act is its "ideological" character. This is directly related to the broad scope of coverage, which tends to inhibit careful scrutiny of a problem area. But it also follows a scenario that is all too common in federal legislation. A relatively narrow abuse is discerned. This abuse is broadened. As it is broadened, a "disclosure" approach is substituted for a substantive approach. If disclosure is provided, "the market" will unerringly correct the abuse without the need for direct intervention. The efficiency of our economy is preserved. Each step along this path is a step away from the initial concrete problem in the direction of abstraction. Thus, in the case of the Magnuson-Moss Act, the initial problem was automobile warranties and repairs. Fairly thorough study of this problem resulted in a recommendation of substantive regulation.¹²⁸ As the

127. 40 F.R. 60,182 (1975).

128. See sources cited note 122 *supra*.

scope of proposed legislation was broadened, the scrutiny of the underlying problem became increasingly superficial. As noted, the final legislation affects all consumer products costing more than five dollars. It may safely be said that no accurate study of the extent of the problem posed by products costing more than five dollars, as opposed to automobiles, accompanied this extension of coverage. The process was analogical and impressionistic. This flight into the abstract that starts with the basic task of problem identification becomes pronounced when the stage of solution is reached. The disclosure and labeling provisions of the Act reveal this most clearly in their reliance on the invisible hand of the market to effect the Act's goals.

A peculiarity of the Act is its ambivalent, not to say inconsistent, attitude toward the existence of competition in the consumer marketplace. On the one hand, lack of clarity in consumer warranties is assumed to stem from lack of competitive forces. The "lack" lies primarily on the side of warrantors and within their control. They refrain from breaking lockstep and entering into warranty competition. On the other hand, this stagnant atmosphere is supposed to be dispelled by the simple expedient of requiring a few disclosures and one bright label. The Act promises that vigorous competition will ensue. Why the same warrantors who were both loath to compete and sufficiently insulated from pressure to be free not to compete will suddenly feel a competitive urge is not evident. On the contrary, it would seem predictable, if the first gloomy vision of the market is accurate, that warrantors would meet the new disclosure requirements by disclosing basically parallel terms and the labeling requirement by uniformly adopting "limited" warranties. And this has largely been the pattern to date.

The Act's ambivalence toward the marketplace is matched by and related to its ambivalent view of consumers. Pre-Act consumers, on the one hand, were ignorant, passive and disorganized. They lacked both the knowledge and the resources to secure information from warrantors or to know that they should. On the other hand, the post-Act consumer is supposed to be one who will be interested in the information that is now provided and will skillfully compare it in making purchases.

Before relying upon disclosure legislation to solve the problems of the warranty marketplace and before imposing the costs of disclosure upon warrantors, it would be useful to know how much truth there is in

these visions of the market and the consumer.¹²⁹ Is it likely that consumers will show an interest in warranty information if it is provided? What are the effective limits upon a consumer's ability to digest information and to compare information of this type? Are there certain types of information that are much more useful to consumers than others? In the Magnuson-Moss Act, these questions have been answered by reference to competing ideologies and impressions rather than upon any firm empirical base.

A final question raised by the Act is the extent to which alternative means of achieving the desired goals should have been considered. Passage of the Act involved early conflict between proponents of substantive regulation of warranty terms and proponents of disclosure requirements enforceable through a federal agency and private rights of action. This is an old conflict, and the usual answer is as old. The costs, either in the form of higher costs to consumers or diminished profits to warrantors (and taxes to governments) are uncertain but substantial. What could an equivalent amount of money accomplish in the form of direct expenditures for consumer education or funding government testing and rating programs or subsidizing existing consumer action groups or existing dispute settlement programs? Some of these questions would be difficult to answer, but more of them should be asked.¹³⁰

IV. CONCLUSION

The above critique may be viewed as lacking compassion for the plight of the consumer in a modern world of corporate entities and complex marketing arrangements. But the issue is not one of the presence or absence of compassion; it is one of the accuracy with which problems existing in the consumer marketplace have been identified and the efficacy of the solutions that have been proposed for them. The Magnuson-Moss Act gives reasonable cause for concern on both points.

129. For a thoughtful discussion of the efficacy of disclosure regulation, see Whitford, *Disclosure Regulation*, *supra* note 23. For Professor Whitford's pessimistic assessment of disclosure regulation of automobile warranty dispute settlement, see also Whitford, *Automobile Warranty*, *supra* note 22, at 1096-97.

130. A Federal Consumer Protection Agency might assist in both asking and answering such questions. During the period when the Act was under consideration, proposals for such an agency were also before Congress. S. 3970, 92d Cong., 2d Sess. (1972), for instance, would have authorized grants to local consumer programs and authorized a federal administrator to conduct and assist research. S. REP. No. 1100, 92d Cong., 2d Sess. 14-16 (1972).

The decision to impose yet another piece of disclosure legislation upon the business community, sweeping in its application, without very discernible benefits, is especially regrettable. It is true that the business community has been guilty of consistently attacking legislation with indiscriminate cries of "increased costs," often without any attempt to formulate specifically the magnitude or nature of the costs involved. Undoubtedly many in political life and in the community at large have tired of these tactics; and certainly legislation that holds the promise of clearly identified benefits cannot be held in indefinite abeyance on the basis of inarticulate assumptions about cost. Yet at the same time it takes a naive person indeed to believe that burgeoning federal paperwork requirements do not add to costs. The difficulty of accurately estimating such costs, coupled with the certainty that they do exist, makes it all the more important that the benefits to be obtained by legislation be carefully thought through.

Not a single informal dispute mechanism is presently operative, although this was perhaps the most promising idea in the legislation. The quantum of warranty offered in sales of consumer goods has not been altered discernibly—full warranties remain the exception; the majority of warrantors who offer a warranty have simply designated their warranties as limited. Some improvement in the clarity with which warranty terms are stated has occurred.

Three Congresses labored to bring forth this legislation; it is a disappointing work product.

