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# Consumer Protection: The Effect of the Song-Beverly Consumer Warranty Act

Eileen K. Jenkins

*University of the Pacific; McGeorge School of Law*

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# Consumer Protection: The Effect Of The Song-Beverly Consumer Warranty Act

*In recent years legislatures and courts throughout the country have manifested a growing concern for protection of consumer interests. California has been in the forefront of this growing concern. Until 1971 California consumers found protection in the warranty provisions of the Uniform Commercial Code and in the expanding doctrine of strict liability in tort for defective products. In 1970 the California Legislature passed the Song-Beverly Consumer Warranty Act which became effective in March of 1971. In 1971 the Legislature enacted amendments to this act which became effective in March 1972. This comment summarizes the nature and scope of the remedies available to California consumers under the Song-Beverly Consumer Warranty Act, and compares the Act with the warranty provisions of the Uniform Commercial Code and the doctrine of strict liability in tort. The author concludes that, although there is much remaining to be accomplished in the area of consumer warranty protection, the Song-Beverly Act as amended in 1972 is a significant step forward in providing adequate protection to California consumers.*

Consumption is the sole end and purpose of all production: and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer. The maxim is so perfectly self-evident, that it would be absurd to attempt to prove it.<sup>1</sup>

Consumer interests have long been a governmental concern.<sup>2</sup> The President's Commission on Civil Disorders in 1968 disclosed that unfair consumer sales and trade practices were one of the twelve major sources of discontent in urban ghettos.<sup>3</sup> Beyond the problem of urban ghettos, however, it has been estimated that about 20 percent of the national output of goods are sold by means of misrepresentation or at

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1. A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1937).

2. COUNCIL OF STATE GOVERNMENTS, CONSUMER PROTECTION IN THE STATES (1970).

3. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 143-145 (1968).

an inflated price.<sup>4</sup> Furthermore, recent California products liability litigation indicates that the California consumer has been sold many dangerous and defective products. He has found ground glass in his food,<sup>5</sup> maggots and worms in his sandwich,<sup>6</sup> exploding beer and coke bottles,<sup>7</sup> broken milk bottles,<sup>8</sup> collapsing cartons,<sup>9</sup> grinding wheels that blow up<sup>10</sup> or shatter in his face,<sup>11</sup> airplanes that cannot safely be flown<sup>12</sup> and automobiles that cannot safely be driven.<sup>13</sup>

In spite of these problems California has been a leader in the consumer protection field. In the midst of what has been called a consumer revolution,<sup>14</sup> the Song-Beverly Consumer Warranty Act<sup>15</sup> (Song-Beverly Act) was passed by the California Legislature.<sup>16</sup> The Song-Beverly Act generally complements the provisions of the Uniform Commercial Code, as enacted in California, but where there is a conflict, the provisions of the Song-Beverly Act prevail.<sup>17</sup>

The provisions of the Act protect purchasers of consumer goods. Goods are defined to include any new mobile home, motor vehicle, appliance or the like which is primarily for personal, family or household use. The definition of goods also includes personal, family or household goods if the retail sale of such goods is accompanied by an express warranty, but excludes *soft goods* and *consumables* meaning clothing, food, drugs, cosmetics, or like products.<sup>18</sup> This definition is severely limited in comparison with the broad coverage of goods under the California Commercial Code.<sup>19</sup>

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4. COUNCIL OF STATE GOVERNMENTS, *supra* note 2, at 3.

5. Goetten v. Owl Drug Co., 6 Cal. 2d 683, 59 P.2d 142 (1936).

6. Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939).

7. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944); Jones v. Burgermeister Brewing Corp., 198 Cal. App. 2d 198, 18 Cal. Rptr. 311 (1961).

8. Vassallo v. Sabatte Land Co., 212 Cal. App. 2d 11, 27 Cal. Rptr. 814 (1963).

9. Faucette v. Lucky Stores, Inc., 219 Cal. App. 2d 196, 33 Cal. Rptr. 215 (1963).

10. Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 353 P.2d 575, 5 Cal. Rptr. 863 (1960).

11. McCurter v. Norton Co., 263 Cal. App. 2d 402, 69 Cal. Rptr. 493 (1968).

12. Lindberg v. Croutches, 167 Cal. App. 2d 828, 334 P.2d 701 (1959).

13. Budrow v. Wheatcraft, 115 Cal. App. 2d 517, 252 P.2d 637 (1953). (locking brakes). This does not seem to be an uncommon problem. "Regardless of which American car you buy, chances are the brakes are either defective or dangerously inadequate under expected conditions of highway use, even when the car is brand-new." NADER, DODGE, HOTCHKISS, WHAT TO DO WITH YOUR BAD CAR; AN ACTION MANUAL FOR LEMON OWNERS (1971).

14. See Comment, *Consumer Protection and Warranties of Quality, A Proposal for a Statutory Warranty in Sales to Consumers*, 34 ALBANY L. REV. 339 (1970).

15. CAL. STATS. 1970, c. 1333 at 2478.

16. The Song-Beverly Act was enacted in 1970, and took effect in March 1971. It was subsequently amended in 1971; the amendments taking effect in March 1972 (CAL. STATS. 1971, c. 1523 at 3001).

17. CAL. CIV. CODE §1790.3.

18. CAL. CIV. CODE §1791.

19. CAL. COMM. CODE §2105.

To give full appreciation to the importance of the Song-Beverly Act and to clarify the nature and scope of the remedies available to the California consumer, the Act will be compared with the statutory law of warranties and with the judicially developed law of strict liability in tort.

### *The Song-Beverly Act and Warranty Law*

Traditionally, the most common form of redress for injury caused by a defective product was an action for breach of warranty.<sup>20</sup> Such an action had attributes of both contract and tort.<sup>21</sup> Early warranty cases were in the nature of a tort action for deceit, but there was no requirement of scienter or awareness of the falsity of the representations by the seller.<sup>22</sup> Modernly, a warranty is generally considered as either express or implied and is viewed as an element of the contract under which a product is sold.<sup>23</sup> The warranty obligation, or quality term, as it is sometimes called, is one of the most important provisions in a sales contract, and it has been estimated that as much as one third of all sales litigation has been concerned with it.<sup>24</sup>

#### *A. The Express Warranty*

An express warranty is made as a part of a bargain by acts or agreements of the parties; it does not arise by operation of law.<sup>25</sup> Common law *caveat emptor* encompassed a rule that the seller had no

20. See Comment, *The Contractual Aspect of Consumer Protection: Recent Developments in the Law of Sales Warranties*, 64 MICH. L. REV. 1430 (1966).

21. See Note, *Warranty: Tort and Contract Characterization: Statutes of Limitations*, 43 CALIF. L. REV. 546, 549 (1955).

22. W. SEDGWICK, S. CONLEY & R. SLEIGHT, *PRODUCTS LIABILITY IMPLIED WARRANTIES* (1964). The tort action was an action on the case; the wrong was a form of misrepresentation which was not clearly distinguished from deceit. Assumpsit, from which the modern law of contract has grown, developed in the 15th century, at least partially based on the earlier warranty actions. It also was originally an action of trespass on the case. In 1778, the case of *Stuart v. Wilkins* became the first case to apply the contract theory to what had traditionally been an action in tort. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 118 (1943); O.W. HOLMES, *THE COMMON LAW* 215, 216-224 (Howe ed. 1963); *Stuart v. Wilkins*, 1 Doug. 18, 99 Eng. Rep. 15 (K.B. 1778); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099, 1126-27 (1960); Williston, *Liability for Honest Misrepresentations*, 24 HARV. L. REV. 415, 420 (1911).

23. Project, *The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A. L. REV. 890, 989 (1969). Comment, *The Contractual Aspect of Consumer Protection: Recent Developments in the Law of Sales Warranties*, 64 MICH. L. REV. 1430 (1966).

24. W. HAWKLAND, *A TRANSACTIONAL GUIDE TO THE U.C.C.*, Vol. I at 57 (1964). Professor Vold delineates the triple pronged nature of a warranty as:

Prong no. 1, the promissory warranty, is strictly contractual; prong no. 2, the warranty obligation is based on the seller's representations, including the deal, and is independently imposed by law, comparable to tort obligations; prong no. 3 is also independently imposed by law, apart from the seller's representations, for strictly public policy reasons.

M. VOLD, *LAW OF SALES* 1127 (2d ed. 1959).

25. Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A. L. REV. 281, 284 (1961).

responsibility for the quality of the goods sold unless he expressly guaranteed them.<sup>26</sup> Some courts required the use of words of art such as "I warrant" or "I guarantee" to show the seller's specific intent to create a warranty.<sup>27</sup> Inroads were made in the first quarter of the Twentieth Century, when courts ruled that no particular form of words was necessary to constitute an express warranty, so long as the buyer could reasonably have understood from the transaction that what was said was affirming essential qualities of the product. If the buyer relied on the affirmation in good faith, an express warranty was created.<sup>28</sup>

In 1965 the Uniform Commercial Code (hereafter U.C.C.) went into effect in California.<sup>29</sup> Express warranties are defined in the California Commercial Code (California's version of the U.C.C.) at Section 2313.<sup>30</sup> It specifies that an express warranty is created by: (1) an affirmation of fact or promise relating to the goods; (2) a description of the goods; or (3) a sample or model.<sup>31</sup> The facts creating the warranty must be a part of the basis of the bargain before an express warranty will arise.<sup>32</sup> There is a problem, however, in that neither the U.C.C. nor the California Commercial Code defines the term "basis of the bargain."<sup>33</sup> The U.C.C. does, however, give some aid to interpretation of "basis of the bargain" in the comments accompanying it, which indicate that all statements of the seller become part of the basis of the bargain unless good reason is shown to the contrary.<sup>34</sup> The factual question of what constitutes the basis of the bargain depends on the circumstances of the case.<sup>35</sup> Some statements by the seller may not be taken as affirmations or promises which enter into the bargain because the seller is only "puffing" and no warranty is created at all.<sup>36</sup> Where the line is to be drawn, however, between warranty and puffing is not apparent.<sup>37</sup>

26. HAWKLAND, *supra* note 24, at 57.

27. *Id.*

28. *Steinver v. Jarrett*, 130 Cal. App. 2d Supp. 369, 872, 280 P.2d 235 (1954); *Cole v. Weber*, 69 Cal. App. 394, 397, 231 P. 353 (1924).

29. CAL. COMM. CODE §1101 *et seq.* CAL. STATS. 1963, c. 819 at 1849. In 1931 California adopted the Uniform Sales Act but the adoption did not affect the prior existing case law regarding express warranties, CAL. STATS. 1931 c. 1070 at 2234; *see Stott v. Johnston*, 36 Cal. 2d 864, 869-870, 229 P.2d 348, 351 (1951).

30. This section is identical to the uniform version.

31. CAL. COMM. CODE §2313(1).

32. *Id.*

33. Prof. Hawkland suggests that any statement which reasonably induces the buyer to act becomes a *basis of the bargain*. HAWKLAND, *supra* note 24 at 58.

34. *See* U.C.C. §2-313, Comments 3, 8. *See also* Comment, *The Extension of Warranty Protection to Lease Transactions*, 10 BOST. COL. IND. & COM. L. REV. 127, 128 (1968). Clear affirmative proof must be presented by the seller in order to obviate this presumption.

35. U.C.C. §2-313, Comment 3.

36. U.C.C. §2-313, Comment 8 and CAL. COMM. CODE §2313(2).

37. *See*, Comment, *supra* note 14, at 343.

Under the Song-Beverly Act, an express warranty arising out of a sale of consumer goods must be written,<sup>38</sup> or if there is a sample or model, the goods must conform to the sample or model.<sup>39</sup> Under the California Commercial Code, statements may be oral or written to create an express warranty.<sup>40</sup> Since conflicts are resolved in favor of the Song-Beverly Act,<sup>41</sup> the more strict rule applies in consumer sales. The drafters of the Song-Beverly Act felt that more formality was necessary in applying its additional remedies to an express warranty.<sup>42</sup>

In creating an express warranty by sample or model, the Song-Beverly Act, unlike the California Commercial Code, does not require the sample or model to be part of the basis of the bargain.<sup>43</sup> However, application of either provision would appear to produce the same result, except in rare instances. For example, a green four-slice toaster sits on the shelf of the store with a number 56 on it. The consumer orders a 56 toaster. When she takes it home and opens the box, she finds a red four-slice toaster. The express warranty under the Song-Beverly Act is breached by the fact that red is not green.<sup>44</sup> Under the California Commercial Code the same result would be reached using the presumption that the sample as a whole, including color, was intended to be part of the basis of the bargain. Absent some unmistakable denial, if the sample toaster had been drawn from stock on hand, it must be regarded as describing values of the goods for which the buyer had contracted.<sup>45</sup> However, where a model of merchandise is offered for inspection<sup>46</sup> (e.g., where the toasters are being shipped from the factory and are not in the store at the time of the making of the contract), the mercantile presumption that the model has become a literal description of the subject matter is not so strong.<sup>47</sup> If the seller could show that the model toaster was illustrative of four-slice

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38. CAL. CIV. CODE §1791.2(a)(1).

39. CAL. CIV. CODE §1791.2(a)(2).

40. The Code refers to "any affirmation of fact or promise . . ." CAL. COMM. CODE §2313(1)(a).

41. CAL. CIV. CODE §1790.3.

42. Interview with Richard Thompson, Administrative Assistant to Senator Alfred Song, in Sacramento, California, Jan. 25, 1972 [hereinafter cited as *Thompson*].

43. Compare CAL. CIV. CODE §1791.2(a)(2) with CAL. COMM. CODE §2313.

44. The whole of the goods (the toaster) does not conform to the sample or model. CAL. CIV. CODE §1791.2(a)(2).

45. See U.C.C. §2-313, Comment 6. Should the consumer have been color blind and could not tell red from green, the color would not be a part of the basis of the bargain, and no express warranty as to color would be created under the California Commercial Code. There is still an express warranty as to color under the Song-Beverly Act.

46. The Song-Beverly Act does not define sample or model. The California Commercial Code makes the distinction that "sample" is something actually drawn from the bulk of goods which is the subject matter of the sale, and "model" is that which is offered for inspection when the subject matter is not at hand and which has not been drawn from the bulk of the goods. See U.C.C. §2-313, Comment 6.

47. U.C.C. §2-313, Comment 6.

toasters without regard to color, it could be held as a suggestion of the character of the subject matter of the contract and not as the basis of the bargain. As such, there would be no express warranty as to color under the California Commercial Code. Under the Song-Beverly Act there would still be an express warranty as to the color. As a result, it appears that the Song-Beverly Act extends the protection available to California consumers with respect to express warranties.

### B. *The Implied Warranty of Merchantability*

Only express warranties were recognized at common law. Early in the Nineteenth Century, however, as greater protection for the buyer was desired, two distinct implied warranties of quality developed in situations in which the buyer relied on the skill and judgment of the seller—merchantability and fitness for purpose.<sup>48</sup>

As the concept of merchantability developed,<sup>49</sup> it came to mean that goods must pass under the same description specified in the agreement and be reasonably fit for the ordinary uses to which such goods are put. Only persons generally handling goods of the kind in question impliedly warrant merchantability. At common law, a dealer was not liable unless he was also the manufacturer, no element of reliance being present.<sup>50</sup>

The Uniform Commercial Code Section 2-314 (California Commercial Code Section 2314) contains much of the law developed under the common law and the Uniform Sales Act. It follows the Uniform Sales Act's rationale that the seller should assume responsibility for

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48. SEDGWICK, CONLEY & SLEIGHT, *supra* note 22, at 3.

49. The first significant case applying the warranty of merchantability was *Gardiner v. Gray*, 4 Camp. 144, 171 Eng. Rep. 46 (K.B. 1815), Lord Ellenborough set out the fundamental principle of merchantability in terms of saleability:

I am of the opinion, however, that under such circumstances, the purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty, there is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of caveat emptor does not apply. He cannot without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill.

See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 463-64 (1897); Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 120-21 (1943).

50. Sedgwick, *supra* note 22, at 4. See also Prosser, *supra* note 49, at 125 where he states that a seller's obligation to deliver merchantable goods was at least that the goods were:

- (1) genuine according to the name and description,
- (2) saleable in the market under the designation,
- (3) fit for the ordinary uses and purposes of such goods, and
- (4) free from defects interfering with the sale or ordinary use.

He adds quality and price, to mean a minimum standard of quality called for by a merchantable article.

defective products as a cost of doing business.<sup>51</sup> The U.C.C. implies the warranty of merchantability only "if the seller is a merchant with respect to goods of that kind."<sup>52</sup> This means that if a person makes an isolated sale, no warranty of merchantability would be implied.<sup>53</sup> The Song-Beverly Act parallels this provision.<sup>54</sup>

To imply merchantability under the U.C.C. there must be a *sale of goods*.<sup>55</sup> California has long been in accord with the U.C.C. provision that treats the serving of food and drink as a *sale of goods* for purposes of implying a warranty of merchantability.<sup>56</sup> However, the conceptual problems in nonfood *services versus goods* situations still remain and developing case law must be examined to determine if a sale of services or goods has occurred.<sup>57</sup> Whether or not definitional problems of what is, or is not, a sale of goods will occur under the Song-Beverly Act remains to be seen.

The California Commercial Code sets forth minimum standards as to what constitutes merchantability. Fungible goods must be of *fair average quality* and pass *without objection* in the trade; nonfungible goods must merely pass without objection in the trade with no minimum quality standard delineated.<sup>58</sup> The term *without objection* is not clearly defined.<sup>59</sup> The 1952 draft of the U.C.C. provided that the

51. Prosser, *supra* note 49, at 122.

52. CAL. COMM. CODE §2314(1). This is a smaller group than everyone engaged in business and requires a professional status as to particular kinds of goods. CAL. COMM. CODE §2104, *See also* U.C.C. §2-104, Comment 2.

53. CAL. COMM. CODE §2314; *see also* U.C.C. §2-314, Comment 3.

For example, a radio salesman selling his own car is not a merchant with respect to the car and no warranty of merchantability would arise with the sale.

54. CAL. CIV. CODE §1791.

55. Miller, *A "Sale of Goods" As A Prerequisite For Warranty Protection*, 24 BUS. LAW, 847, 848 (1969).

56. U.C.C. §2-214; *Klein v. Duchess Sandwich Co.*, 14 Cal. 2d 272, 93 P.2d 799 (1939); *Mix v. Ingersoll Candy Co.*, 6 Cal. 2d 674, 59 P.2d 144 (1936).

57. *See, e.g.*, *Perlmutter v. Beth David Hospital*, 308 N.Y. 100, 123 N.E.2d 792 (1954); *See also* Comment, *Sales: Implied Warranty—Furnishing of Blood By a Hospital For A Hospital For A Transfusion*, 7 HAST. L.J. 217 (1956); *But see* CAL. HEALTH & SAFETY CODE §1623.

58. CAL. COMM. CODE §2314(2) Goods to be merchantable must be at least such as:

- (a) pass without objection in the trade under the contract description; and
- (b) in the case of fungible goods, are of fair average quality within the description; and
- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged and labeled as the agreement may require; and
- (f) conform to the promises or affirmations of fact made on the container or label if any.

*See also* U.C.C. §2-314, Comment 7.

59. *See* U.C.C. §2-314, Comment 7, stating that a fair percentage of the least or worst is permissible but the goods are not "fair average" if they are all of the least or worst quality under the description. For example, for 100 widgets to be of "fair average" they cannot all be widget, grade worst. However, "fair average" may be 40



*fair average* standard should apply to all merchantable goods, but in subsequent drafts the *fair average* standard was limited to fungible goods because of pressures from certain mercantile interests.<sup>60</sup>

The requirement that the goods be fit for ordinary purposes for which goods of that type are used is a fundamental concept of merchantability.<sup>61</sup> There is a question, however, as to the merchantability of goods which have a defect that is deemed *natural* to that type of product. A Pennsylvania case allowed recovery for a chicken bone found in a chicken pie;<sup>62</sup> a Massachusetts case denied recovery for a fish bone found in New England fish chowder;<sup>63</sup> and finding a cherry pit in a cherry pie was a "reasonable expectation" in Oregon.<sup>64</sup> The ultimate criteria in these cases appears to be that the item must pass without objection in the trade under the contract description (with the knowledge of the potential defect).<sup>65</sup>

Another element of the implied warranty of merchantability, at least under the California Commercial Code, is that goods must conform to promises or affirmations on the label or container.<sup>66</sup> However, affirmations on the label are express warranties if they are part of the basis of the bargain,<sup>67</sup> whether read before or after the time of purchase.<sup>68</sup> The result of this is that one appears to have a problem in determining who is liable on what theory (express or implied warranty) when the goods do not conform to the label. This becomes significant in questions of disclaimer, since express warranties are more difficult to disclaim than implied warranties. The most reasonable construction seems to be that if the buyer did read the label, or other circumstances show that the affirmations on the label became a part of the basis of the bargain

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widgets, grade worst, and 60 widgets, grade slightly better than worst. The standard for passing without objection in the trade would seem to depend on how loudly buyer's screamed when sellers tendered 100 widgets, grade worst.

60. Ezer, *supra* note 25, at 293. However, as the Code broadly defines fungibles under §1201(17), courts could interpret the "pass without objection" standard reasonably close to "fair average." *Id.* at 294.

61. CAL. COMM. CODE §2314(2)(c); *See also* U.C.C. §2-314, Comment 8.

62. DeGraff v. Myers Foods, Inc., 19 Pa. D. & C.2d 19, 8 Bucks Co. L. Rep. 364 (C.P. 1958).

63. Webster v. Blue Ship Tea Room, Inc., 347 Mass. 421, 198 N.E.2d 309 (1964). The court suggests that the risk is well taken when one eats the glorious New England fish chowder.

64. Hunt v. Ferguson-Paulus Enterprises, 82 Or. Adv. Sh. 785, 415 P.2d 13 (1966).

65. CAL. COMM. CODE §2314(2)(a). *See* Bailey, *Sales Warranties, Products Liability and the U.C.C.: A Lab Analysis of the Cases*, 4 WILLAMETTE L.J. 291, 301 (1967) for further discussion of "natural defects."

66. CAL. COMM. CODE §2314(2)(f).

67. CAL. COMM. CODE §2313(1)(a), (b); *see also* U.C.C. §2-313, Comment 3.

68. CAL. COMM. CODE §2313; *see also* U.C.C. §2-313, Comment 7. The express warranty on the label modifies the contract; no consideration is necessary. CAL. COMM. CODE §2209(1). A written modification satisfies the requirement of CAL. CIV. CODE §1698, carried forward into CAL. COMM. CODE §2209(2).

between the seller and the buyer, then the seller is liable on an express warranty theory, whether he actually put the label on the product or not. The actual labeler would also be liable on the same theory. If the buyer did not read the label, or other circumstances show that the label was not a part of the basis of the bargain, then no express warranty results under the California Commercial Code, either on the part of the labeler, or the nonlabeler seller. The remedy would be for breach of the implied warranty of merchantability.<sup>69</sup>

Under the Song-Beverly Act the confusion as to whether promises or affirmations of fact on the container or label are express or implied warranties is avoided. Nevertheless the consumer appears not to be as well off under the Song-Beverly Act as he is under the California Commercial Code. This results from the narrow definition of express warranty under the Song-Beverly Act. That is, unless the statements on the label deal with preserving or maintaining the utility or performance of the good, or providing compensation when there is a failure in utility or performance, there would only be an implied warranty that the goods would conform to the statements on the label or container.<sup>70</sup>

The minimum standard for merchantability under the Song-Beverly Act substantially follows the Commercial Code.<sup>71</sup> The Song-Bev-

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69. One author suggests that this provision is geared toward making the non-labeler seller of the goods responsible on an implied warranty theory; the actual labeler's liability rests on express warranty. This puts a minimum responsibility on the seller whether or not he adopts the statements on the label as his own express warranties. See Cosway, *Sales—A Comparison of the Law In Washington and the Uniform Commercial Code*, 35 WASH. L. REV. 617, 623 (1960). The Code, however, does not distinguish between the labeler and nonlabeler, and suggests that if a label is put on the goods, there is an implied warranty. CAL. COMM. CODE §2314, see also U.C.C. §2-314 Comment 10. The New York Law Revision Commission suggests that the section should be interpreted as a supplement to the general rule that any "affirmation of fact or promise [which] becomes part of the basis of the bargain" creates an express warranty. If the buyer read the label before purchasing, it is part of the basis of the bargain. If he bought without reading and later learned that the goods were not as represented, they would be unmerchantable under §2-314(2)(f). 1 NEW YORK LAW REVIEW COMM. STUDY OF THE U.C.C., 399 (1955). Cited with approval in CONTINUING EDUCATION OF THE BAR, *California Commercial Law*, §6.68 (1966).

70. CAL. CIV. CODE §§1791.1(a)(4), 1791.2.

71. CAL. CIV. CODE §1791.1(a) "Implied warranty of merchantability" or "implied warranty that the goods are merchantable" means that the consumer goods meet each of the following:

- (1) Pass without objection in the trade under the contract description.
- (2) Are fit for the ordinary purposes for which such goods are used.
- (3) Are adequately contained, packaged and labeled.
- (4) Conform to the promises or affirmations of fact made on the container or label.

Fungible consumer goods are subject to the same standards as other consumer goods. Recall that under the U.C.C. fungible goods are subject to what semantically, at least, appears to be a higher standard of merchantability. (See note 58, *supra*). It should be noted that under the Song-Beverly Act the warranty of merchantability is assertable against manufacturers only. (CAL. CIV. CODE §1792). This appears to be an extension of the protection afforded under California Commercial Code Section 2314 which

erly Act originally provided that goods be free from defects in materials or workmanship. The 1971 amendment to the Act, however, removed this requirement.<sup>72</sup> For consumers, this appears undesirable in that it returns the implied warranty to the Commercial Code's standard of *no objection in the trade* rather than *free from defects in materials and workmanship*.<sup>73</sup>

Consumers may derive additional benefit, however, from the Song-Beverly Act's requirement that goods need to be adequately contained, packaged and labeled before the warranty of merchantability is satisfied.<sup>74</sup> The Commercial Code standard of merchantability requires goods to be adequately contained, packaged and labeled as an *agreement may require*, and *applies only* where the *nature* of the goods or the transaction requires a certain type of container, package or label.<sup>75</sup> The Song-Beverly Act's standard appears to be a codification of broad protections afforded the consumer by earlier case law,<sup>76</sup> that the adoption of the Commercial Code seemed to have narrowed.

### C. *The Implied Warranty of Fitness For a Particular Purpose*

The implied warranty of fitness for the buyer's particular purpose is distinct from the warranty of merchantability, although the two often overlap. The early English case of *Gray v. Cox* held that "if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose."<sup>77</sup>

The particular purpose doctrine was originally applied to a special purpose as opposed to a general purpose. For greater consumer protection, the doctrine developed to mean the purpose for which a given buyer intended to use the goods, although this purpose in some cases may be merely the ordinary uses to which such goods are customarily put.<sup>78</sup> However, goods may be merchantable and still be unfit for the particular purpose. For example, if a buyer informed the seller that he wanted a toothbrush to clean his typewriter, and relied on the seller's judgment, the implied warranty of fitness for a particular purpose could arise. The toothbrush would be merchantable if it cleaned

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establishes the warranty of merchantability against a merchant seller in a given sales transaction (who is not the manufacturer in most retail sales situations).

72. CAL. STATS. 1971, c. 1523 at 3001.

73. Thornton, *The Song-Beverly Consumer Warranty Act: New Commandments for Manufacturers*, 46 L.A. BAR. BULL. 331, 332 (1971).

74. CAL. CIV. CODE §1791.1(a)(3).

75. CAL. CIV. CODE §2314(2)(e); *See also* U.C.C. §2-314, Comment 10.

76. *E.g.*, *Vassallo v. Sabatte Land Co.*, 212 Cal. App. 2d 11, 27 Cal. Rptr. 814 (1963), *Vallis v. Canada Dry Ginger Ale, Inc.*, 190 Cal. App. 2d 35, 11 Cal. Rptr. 823 (1961).

77. *Gray v. Cox*, 107 Eng. Rep. 999 (K.B. 1825).

78. SEDGWICK, CONLEY & SLEIGHT, *supra* note 22, at 7.

teeth without cleaning the typewriter, but it would not be fit for the particular purpose if it would not clean the typewriter. If the toothbrush were purchased to clean teeth with that purpose known to the seller and with the buyer relying on the seller's judgment, the warranties would coexist and mean the same thing.

Under the California Commercial Code, the warranty of fitness for a particular purpose arises when the seller is aware of the buyer's purpose and is aware that the buyer is relying on the seller's judgment to furnish suitable goods.<sup>79</sup> The buyer does not have to actually notify the seller of his purpose so long as the seller realizes what the purpose is and realizes that the buyer is relying on the seller's judgment.<sup>80</sup>

Under the Song-Beverly Act, the implied warranty of fitness is virtually identical to that of the California Commercial Code.<sup>81</sup>

### *The Application of Warranty Law*

#### *A. Duration*

Generally, when no specific duration for a warranty is expressed, the warranty is breached or not breached at the time of sale.<sup>82</sup> That is, the goods when sold either satisfy, or fail to satisfy, the warranty. If the warranty is prospective and relates to a future event, it is not breached until the happening of that event.<sup>83</sup>

The Song-Beverly Act as originally enacted failed to place a duration on implied warranties.<sup>84</sup> The Act as amended, however, places a duration of 60 days minimum and one year maximum on the implied warranties of merchantability and fitness, if there is an express warranty accompanying the implied warranty. When there is a stated duration for the express warranty which falls between 60 days and one year, if reasonable, the implied warranty would have the same duration. When no duration for the express warranty is stated, the duration for the implied warranty is one year. If no express warranty is

79. CAL. COMM. CODE §2315.

80. CAL. COMM. CODE §2315; U.C.C. §2-315, Comment 1.

81. CAL. CIV. CODE §1791.1(b).

82. In 1967 California adopted the U.C.C.'s section on statute of limitations in contracts for the sale of goods. It established a uniform period of four years for commencing action for breach of an oral or written contract. No specific statute of limitations is specified by the California Commercial Code for breach of implied warranties. CAL. COMM. CODE §2725, enacted, CAL. STATS. 1967 c. 799 at 2207; CAL. CODE CIV. PROC. §339.

83. Thornton, *supra* note 73, at 335. See also, *Aced v. Hobbs Seasack Plumbing Co.*, 55 Cal. 2d 573, 360 P.2d 897, 12 Cal. Rptr. 257 (1961); *Howe v. Pioneer Mfg. Co.*, 262 Cal. App. 2d 330, 68 Cal. Rptr. 617 (1968); *Riesen v. Leeder*, 193 Cal. App. 2d 580, 14 Cal. Rptr. 469 (1961). The California Commercial Code follows prior California law in determining when a warranty is breached when there is no duration placed on it. Thornton, *supra* note 73, at 335.

84. Thornton, *supra* note 73, at 334.

given, there is no duration placed on the implied warranties.<sup>85</sup> This follows the general philosophy of the drafters of the Song-Beverly Act that greater responsibility should be placed on the manufacturer, retailer or distributor when he gives the consumer a written express warranty, as opposed to when he does nothing and lets the consumer rely only on the implied warranties which arise.<sup>86</sup>

### B. Privity

The doctrine of privity is an important concept in determining the scope of the protection afforded injured consumers by warranties. The general rule of privity is that a contractual warranty extends only to parties to the contract.<sup>87</sup> As early as 1842, the English Court of Exchequer held:

Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.<sup>88</sup>

By 1924, however, American courts had begun to liberalize this strict approach.<sup>89</sup>

The first series of cases to eliminate the strict requirement of privity of contract in warranty cases was the food cases.<sup>90</sup> In 1939 California allowed recovery by an ultimate consumer not in privity with the seller, and negated the effect of the language of the Uniform

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85. CAL. CIV. CODE §1791.1(c).

86. *Thompson*, *supra* note 42, Sept. 30, 1971.

87. *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 695, 268 P.2d 1041, 1048 (1954).

88. *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842). The concept in *Winterbottom*, that a contracting party was liable only to those with whom he was in privity led to the doctrine that sellers of defective goods were liable only to their immediate buyers, even when the defect was the result of the retailer's or manufacturer's negligence. See Cohen, *Fault and the Automobile Accident: The Loss Issue in California*, 12 U.C.L.A. L. REV. 164, 171 (1964). The duty of care owed to the consumer was so restricted that the court said that "it is, no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced." *Winterbottom v. Wright*, 152 Eng. Rep. 402, 405 (Ex. 1842). See also, Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

89. Justice Cardozo wrote:

We in the United States have been readier to subordinate logic to utility, so that the remedies of third parties, beneficiaries of a contract, at first grudgingly allowed, are now multiplying and expanding. The development is merely a phase of the assault, now extending along the entire line, upon the ancient citadel of privity.

B. CARDOZO, *THE GROWTH OF THE LAW* 77 (1924). The statement that is perhaps the most widely quoted was made by Justice Cardozo in *Ultramares Corp. v. Touche*, 225 N.Y. 170, 180, 174 N.E. 441, 445 (1931), "the assault upon the citadel of privity is proceeding in these days apace." See also *MacPherson v. Buick*, 217 N.Y. 382, 111 N.E. 1050 (1916).

90. "The emotional drive and appeal of the cases centers in the stomach." Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1138 (1960).

Sales Act which limited warranties to buyer and seller.<sup>91</sup> Other exceptions to the requirement of privity developed as courts invented ingenious but unconvincing theories of fictitious agency, third-party beneficiary contract, and other principles to get around the doctrine of privity.<sup>93</sup>

In the field of products liability Prosser dates the "fall of the citadel of privity" as May 9, 1960, when the Supreme Court of New Jersey decided the case of *Henningsen v. Bloomfield Motors, Inc.*<sup>93</sup> In that case it was held that a strict approach to privity of contract would not be allowed to bar a consumer from having an action against a manufacturer for breach of a warranty of merchantability.<sup>94</sup>

California at the time of *Henningsen* was still trying to find exceptions to privity by use of the sales warranty, and interpreted the term so as to find an employee of the buyer in privity with the seller, as part of the buyer's economic "family," severely stretching the concept of privity.<sup>95</sup> The question of how far the courts were going to go in expanding this concept was answered in 1963 when the California Supreme Court detached itself from the confusion surrounding contractual warranty cases, and called a tort a tort. Chief Justice Traynor, writing the opinion for the court in *Greenman v. Yuba Power Products, Inc.*,<sup>96</sup> stated:

A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.<sup>97</sup>

Justice Traynor expressly negated the use of the sales warranty concept with its limitation of privity in governing the remedies of injured consumers, unless the contractual rules also serve the purposes for which strict liability in tort is imposed.<sup>98</sup>

91. *Klein v. Duchess Sanwich Co.*, 14 Cal. 2d 272, 284, 93 P.2d 799 (1939).

92. Prosser, *supra* note 90, at 1124. Holmes, *Codes and the Arrangement of the Law*, 44 HARV. L. REV. 725 (1930-31). "It is the merit of the common law that it decides the case first and determines the principle afterwards." For example, see Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 153-55 (1957).

93. 32 N.J. 358, 383, 161 A.2d 69, 83 (1960). See also Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966). See note 89 *supra*.

94. 32 N.J. at 383-84, 161 A.2d at 83-84.

95. *Peterson v. Lamb Rubber Co.*, 54 Cal. 2d 339, 353 P.2d 575, 5 Cal. Rptr. 863 (1960). See Lascher, *Strict Liability In Tort For Defective Products: The Road To and Past Vandermark*, 38 So. CAL. L. REV. 30 (1965).

96. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

97. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700. The test the court set out to establish the manufacturer's liability rested on the plaintiff's ability to prove that he was injured using the product in a way it was intended to be used, as a result of a defect in design or manufacture of which he was unaware, which made the product unsafe for its intended use. *Id.* at 701.

98. *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

Under the Song-Beverly Consumer Warranty Act, as clarified by the 1972 amendment, retail sales of consumer goods are accompanied by the manufacturer's implied warranty of merchantability, unless disclaimed.<sup>99</sup> This appears to eliminate the privity requirement. Since current California case law indicates that members of the buyer's "economic family" have the retailer's warranty protection extended to them, the same would appear to be true in terms of the manufacturer's warranty. In fact, the wording of the Song-Beverly Act seems broad enough to suggest that unless disclaimed, this warranty would extend to any user or consumer.<sup>100</sup> If the warranty were disclaimed as to the buyer, the implication is that if properly done, the disclaimer would apply to everyone, and that no warranty of merchantability would attach to the goods.<sup>101</sup>

It also appears that if the consumer who purchased the goods, resold them to another person, this would probably not be considered a retail sale of consumer goods and the second buyer would have no recourse against the manufacturer on the warranty of merchantability. The *new* consumer good has in effect become a *used* consumer good. This seems to be the case even if the second sale was within the duration of the original implied warranty given by the manufacturer. For example, *A*, a consumer, buys a toaster with an express warranty given in writing by the manufacturer. The implied warranty would be for a period of a year if no duration is stated for the express warranty.<sup>102</sup> *A* sells the toaster to neighbor *B* after three months. Two weeks later the toaster stops working. *B* does not appear to be within the protection of the Song-Beverly Act. He could not go against *A* on a warranty theory, since *A* did not give *B* an express warranty. *A* is not a dealer in toasters, so no implied warranty of merchantability would attach from *A* to *B*. *B* would have difficulty proving that he had relied on *A*'s skill and judgment to furnish a suitable toaster for his purposes, thus it is doubtful that an implied warranty of fitness for purpose would arise. *A* cannot sue the manufacturer or retailer because it was not his toaster that was damaged. *B* cannot sue the manufacturer because the manufacturer only warranted the new toaster at the first retail sale, and not when it was sold a second time. If the

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99. CAL. CIV. CODE §1792.

100. "unless disclaimed . . . every sale . . . of consumer goods . . ." CAL. CIV. CODE §1792.

101. The Song-Beverly Act does not define "retail sale." However, it does define retail buyer as "any individual who buys consumer goods from a person engaged in the business of manufacturing, distributing or selling such goods at retail." CAL. CIV. CODE §1791(b). A retail seller is one who is in the business of selling consumer goods to retail buyers. CAL. CIV. CODE §1791(e).

102. See text accompanying note 85, *supra*.

toaster exploded because of a defect in manufacture causing personal injury (as opposed to mere economic loss) *B* would have an action against the manufacturer based on strict liability in tort, but that doctrine does not apply to a product which does not work properly.

The Song-Beverly Act as amended in 1972 gives the consumer a possibility of recovering against a manufacturer, as well as against a retailer, on the theory of an implied warranty of fitness for a buyer's particular purpose.<sup>103</sup> The original section treated the retailer's or distributor's implied warranty of fitness for purpose, if applicable, as a substitute for the manufacturer's warranty of fitness.<sup>104</sup> This change is beneficial to the consumer in that he has more parties to look to for recovery should the warranty be breached. The manufacturer, retailer and distributor must still have reason to know the buyer's particular purpose, and the buyer must rely on all three parties in order for all of them to be liable to the buyer on the implied warranty of fitness of purpose. If the buyer relied on only one of the parties, or only that party was deemed to have the requisite knowledge, then only that party would be liable to the buyer.<sup>105</sup>

### C. *The Duty to Service Goods Under an Express Warranty*

To the consumer, a warranty usually means that the manufacturer will stand behind his product and make whatever repairs are necessary within a stated period of time.<sup>106</sup> This is not always true. It is often very difficult for the layman to understand what is or is not covered by a warranty. Warranties are also frequently vague as to whom the consumer is to look to for repairs and as to the length of time in which the vendor must make the repairs. Furthermore, warranties are of questionable value if the consumer has to send an item across the country or even across several states.<sup>107</sup>

Under the Song-Beverly Act, the manufacturer, distributor or retailer who makes an express warranty must use readily understandable language and clearly identify himself as the party making the warranty.<sup>108</sup> The Act places a duty on manufacturers who give express warranties on

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103. CAL. CIV. CODE §§1792.1, 1792.2.

104. Former CAL. CIV. CODE §1792.2, amended, CAL. STATS. 1971 c. 1523 at 3001. The change, although beneficial, may not have much significance as manufacturers usually do not have the association with retail buyers to know of their particular purpose. Thornton, *supra* note 73, at 351. However, this is not the case where the particular purpose is the same as the ordinary purpose for which the goods are normally used.

105. CAL. COMM. CODE §2315; CAL. CIV. CODE §§1792.1, 1792.2.

106. COUNCIL OF STATE GOVERNMENTS, *supra* note 2, at 11.

107. *Id.* at 11, 12. CONSUMER REPORTS, BUYING GUIDE ISSUE (Dec. 1971) at 386.

108. CAL. CIV. CODE §1793.1(a).



consumer goods sold in California to maintain sufficient service facilities in this State to carry out the terms of the express warranties. The alternative is that the manufacturer must pay any retailer in the State who does his service for him a reasonable handling charge for replacing the goods or making refunds, or must give him a reasonable profit if the goods are repaired.<sup>109</sup> In addition the manufacturer, distributor, or retailer making the express warranties and maintaining service facilities in the State must provide the buyers with the names and addresses of such facilities.<sup>110</sup>

The buyer has a duty to deliver the goods to the manufacturer's service facility, unless—because of size, weight, method of attachment or installation, or the nature of the defect—this is unreasonable. If it is unreasonable for the buyer to return the goods, written notice to the manufacturer will constitute the return and the manufacturer then has the option of servicing the item at the buyer's residence, or providing for its transportation to the service facility, all at the manufacturer's expense. In either case, whether the buyer delivers the goods to the manufacturer's service facility, or if the manufacturer has to make the arrangements, the manufacturer has the obligation to pay for delivery back to the buyer.<sup>111</sup>

The goods must be serviced or repaired to conform to the express warranties within 30 days, unless there is a delay beyond the control of the manufacturer or his representative, or unless the buyer agrees in writing to the contrary.<sup>112</sup> If the goods cannot be serviced or repaired to conform to the express warranties, the manufacturer must either replace the goods or reimburse the buyer for the purchase price. The amount of such reimbursement will depend upon the amount of use attributed to the buyer before discovery of the defect.<sup>113</sup> The Act makes the same kind of provisions applicable to retail sellers who give effect to the manufacturer's warranties when the manufacturer does not maintain the service and repair facilities within the State.<sup>114</sup> These provisions apply only when written express warranties are given

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109. CAL. CIV. CODE §1793.2(a).

110. CAL. CIV. CODE §1793.1(b).

111. CAL. CIV. CODE §1793.2(c).

112. CAL. CIV. CODE §1793.2(b). Before this section was amended, the goods had to be returned in merchantable condition. Now, they only have to conform to the applicable express warranties. This section suggests that even though the implied warranty of merchantability must be present when the express warranty is given (CAL. CIV. CODE §1793), none of the duties which are incumbent upon the manufacturer giving express warranties apply to implied warranties. This seems to be borne out by the fact that the word "express" was added, making the words "do not comply with the applicable warranties" read "do not conform with the applicable express warranties . . . ."

113. CAL. CIV. CODE §1793.2(d).

114. CAL. CIV. CODE §1793.3.

with consumer goods.<sup>115</sup> However, when consumables and soft goods, (which were specifically excluded from the Act's definition of consumer goods), are accompanied by an express warranty, the buyer may return the goods within 30 days of purchase or the period specified in the warranty, whichever is greater. The manufacturer or retailer must replace the nonconforming goods or reimburse the buyer for his purchase price.<sup>116</sup>

Since neither the U.C.C. nor case law covered situations in which consumers had to send their goods across the country to be repaired, or provided a definite time period within which manufacturers had to repair the goods,<sup>117</sup> the Song-Beverly Act, in this regard, is a significant step toward solving consumer service problems in California.

Some difficulties remain, however. The Song-Beverly Act does not specify what facts go *beyond the control* of the retailer or manufacturer which would extend the 30 day period for servicing; it could be anything from a strike to a "busy season." Interpreted broadly, the section could be rendered meaningless. In addition the 30 day provision may be waived; the only requirement is that it must be a written waiver. It could be waived at the time of the sale, perhaps in the written contract itself.<sup>118</sup> It is possible that the language of waiver that the buyer signs might give him very little indication of what he is waiving.

#### D. Used Goods

The California Commercial Code alludes to used goods in a Comment stating:

A contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description.<sup>119</sup>

In other words, they had to be merchantable as second-hand goods, but the seller's obligation is a question of fact.<sup>120</sup> Used goods could also be the subject of the implied warranty of fitness for a particular purpose under the California Commercial Code, if the requirements were fulfilled.<sup>121</sup> Strict liability in tort recognizes no real distinction between "new" and "used" goods.<sup>122</sup>

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115. CAL. CIV. CODE §§1793.1, 1793.2.

116. CAL. CIV. CODE §1793.35.

117. Murray, *The Consumer and the Code: A Cross-Sectional View*, 23 U. MIAMI L. REV. 11, 28-29 (1968).

118. CAL. CIV. CODE §1793.2(b); See also Thornton, *supra* note 73, at 351.

119. CAL. COMM. CODE §2314, Comment 3.

120. *Id.* This is the implication from the Comment.

121. CAL. COMM. CODE §2315.

122. Lascher, *supra* note 95, at 58.

The Song-Beverly Act as amended, however, adds a new note to consumer protection in the area of used goods. The obligations of retail sellers and distributors giving express warranties on the used goods are the same as those imposed on manufacturers of new goods under the Act. They too must maintain sufficient service facilities to carry out the terms of their express warranties.<sup>123</sup> However, the section covering liability of manufacturers to retail sellers when the manufacturer does not maintain service facilities in the State does not apply to used consumer goods.<sup>124</sup> The duration on the implied warranties of merchantability and fitness for purpose, when there is an express warranty given, is coextensive with the express warranty if reasonable, but not less than 30 days or more than three months. If no duration is placed on the express warranty, the implied warranties have a duration of three months.<sup>125</sup>

### E. Breach of Warranty

According to the California Commercial Code, when there is a breach of the contractual warranty, the buyer must give notice to the seller within a reasonable time, or be barred from any remedy.<sup>126</sup> This does not seem to apply to parties other than the buyer, but remote parties may be required to give reasonable notice to the seller under the general Code obligation of good faith.<sup>127</sup>

This requirement does not seem to be excluded under the Song-Beverly Act, as the actions for damages are pursuant to the Commercial Code, with exceptions not involving the notice requirement.<sup>128</sup> Under the theory of strict liability in tort, the duty to give notice is eliminated.<sup>129</sup> This difference does not seem overly significant as the Code has been construed very liberally with regard to what constitutes "reasonable notice."<sup>130</sup>

In terms of damages, the Song-Beverly Act adds to the Commercial Code. The Code provides that damages for breach of warranty are the difference between the value of the goods as accepted and the value they would have had if the goods had been as warranted.<sup>131</sup>

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123. CAL. CIV. CODE §1795.5(a).

124. CAL. CIV. CODE §1795.5(b).

125. CAL. CIV. CODE §1795.5(c).

126. CAL. COMM. CODE §2607(3).

127. CAL. COMM. CODE §2607, U.C.C. §2-607.

128. CAL. CIV. CODE §1791.1(d).

129. Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers*, 17 WES. RES. L. REV. 5, 7 (1965).

130. *Id.* at 29.

131. CAL. COMM. CODE §2714.

Incidental and consequential damages may also be recovered.<sup>132</sup> The Song-Beverly Act differentiates between express and implied warranties, while the Commercial Code does not so differentiate. The Song-Beverly Act provides that damages for willful breach of any warranty may result in a judgment for treble damages,<sup>133</sup> but not when judgment is based solely on breach of one of the implied warranties.<sup>134</sup> In addition, in all actions for breach of warranty, express or implied, reasonable attorney fees may be awarded.<sup>135</sup>

Both the California Commercial Code and the Song-Beverly Act permit the limitation of remedies. The Song-Beverly Act's remedies are set forth as replacement, repair or reimbursement. This appears to allow the parties to modify or limit the incidental and/or consequential damages.<sup>136</sup> The Commercial Code also allows damages to be limited to return of the goods and repayment of the price, or to repair and replacement of the goods or parts; this is optional unless expressly agreed to be the sole remedy.<sup>137</sup> However, the California Commercial Code also provides that consequential damages may be limited or excluded unless the limitation is unconscionable, and any such limitation for personal injury to a consumer is presumed unconscionable, unless proved otherwise.<sup>138</sup> Since the question of personal injury is also dealt with by strict liability in tort, where the remedies are not limited, this provision is not as significant to the consumer as it might appear.<sup>139</sup>

#### F. Defenses to the Breach of Warranty

Along with the defense of lack of notice mentioned earlier,<sup>140</sup> most defenses center around the buyer's conduct in dealing with the product.<sup>141</sup> This goes to the issue of whether or not the injuries claimed resulted from the breach of warranty or from the buyer's actions. What the warranty covered, what the buyer should have known, or situations of what is called "abnormal use" of the product are defenses

132. CAL. COMM. CODE §§2714(3), 2715.

133. CAL. CIV. CODE §1794(a).

134. CAL. CIV. CODE §1794.2(b).

135. CAL. CIV. CODE §1794(b).

136. CAL. CIV. CODE §1793 *et seq.* See also Thornton, *supra* note 73, at 354, 355.

137. CAL. COMM. CODE §2719(1),(2).

138. CAL. COMM. CODE §2719(3). This is true even though the general unconscionability section of the Uniform Commercial Code, §2-302, was not adopted in California. The California version, §2719, is only a semantic change from the Uniform Code, which provides for prima facie unconscionability where there is a limitation of consequential damages for injury to the person in the case of consumer goods, but not where the loss is commercial. U.C.C. §2-719(3).

139. Bigham, *Presumptions, Burden of Proof and the Uniform Commercial Code*, 2 U.C.C. L.J. 346, 359 (1970).

140. See text accompanying notes 131-135, *supra*.

141. See generally, Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627 (1968).

raised by the seller to show that the warranty did not cover the particular product in the manner in which the buyer used it. Thus, the seller is not responsible for whatever damage resulted.<sup>142</sup> This has sometimes been called contributory negligence even when dealing with a breach of warranty action.<sup>143</sup>

The Song-Beverly Act specifically provides that defects in consumer goods caused by the unauthorized or unreasonable use of the goods following the sale are not covered by the Act.<sup>144</sup> The rules for both negligence and strict liability in tort do not differ on this point. The seller of the product is not liable when the consumer makes abnormal use of it.<sup>145</sup>

The standard defense of lack of privity which is usually claimed by a remote manufacturer is not available under the Song-Beverly Act<sup>146</sup> or in strict liability in tort for personal injuries.<sup>147</sup> It is applicable, however, if one attempts to maintain an action in strict liability in tort for economic loss.<sup>148</sup>

The seller's response to the implications of warranty has been the disclaimer.<sup>149</sup> The disclaimer is a statement of refusal of the seller to warrant the goods. Historically, it has been upheld in the name of freedom of contract.<sup>150</sup> Some courts have tried to construe the disclaimer as narrowly as possible in order to protect the consumer.<sup>151</sup> Prior to the U.C.C. sellers could disclaim express or implied warranties. The Uniform Sales Act provided for the exclusion of warranties either by express agreement or by usage<sup>152</sup> and California case law followed this lead.<sup>153</sup> Disclaimers took the form of an "as is" or "with all faults" sale, which was held to disclaim all warranties.<sup>154</sup>

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142. See Morrissey, *Warranty in the 1970's*, 5 FORUM 229, 232 (1970).

143. *Id.* at 232. Note, *The Role of Contributory Negligence in Warranty Actions*, 36 SO. CAL. L. REV. 490 (1963).

144. CAL. CIV. CODE §1794.3.

145. Prosser, *supra* note 94, at 824.

146. Thornton, *supra* note 73, at 332.

147. Comment, *Products Liability—Expansion of Fraud, Negligence and Strict Tort Liability*, 64 MICH. L. REV. 1350, 1383 (1966).

148. See text accompanying note 192 *infra*.

149. Comment, *Limitations on Freedom to Modify Contract Remedies*, 72 YALE L. J. 723, 725 (1963).

150. Whitford, *Strict Products Liability and the Automobile Industry: Much Ado About Nothing*, 1968 WIS. L. REV. 83, 96.

151. Hollander, *Consumer Perspective and Consumer Sales Under the Uniform Commercial Code*, 21 N.Y.U. INTRA. L. REV. 241, 242-43 (1966).

152. Comment, *Restricting Disclaimer of the Warranty of Merchantability in Consumer Sales: Proposed Alternatives to the UCC*, 12 WM. & MARY L. REV. 895, 899 (1971).

153. *Miller v. Germain Seed & Plant Co.*, 193 Cal. 62, 222 P. 817 (1924). See also, Note, *Sales: Implied Warranties: Effect of Usage in Implied Warranty of Quality*, 12 CALIF. L. REV. 523 (1924).

154. Comment, *supra* note 152 at 899. It should be noted that the Uniform Sales Act did not contain a provision comparable to the Code which allows for the limitation

Under the California Commercial Code, however, words tending to create an express warranty, and words tending to negate an express warranty found in the same sale, are construed to be consistent if it is reasonable to do so. If unreasonable, the negation has no effect. This section is subject to the Code's parol evidence rules.<sup>155</sup> The problems generally arise when oral express warranties are given, and the written contract states that there are no warranties, express or implied.<sup>156</sup> The parol evidence section of the Code provides that terms of a writing intended as a final expression of the parties' agreement may not be contradicted by evidence of prior or contemporaneous oral agreements.<sup>157</sup> A writing disclaiming warranties after the transaction has been closed, has been held not to be a final expression of the agreement of the parties.<sup>158</sup> In other areas California has a very liberal parol evidence rule,<sup>159</sup> but the section of the California Commercial Code relating disclaimers of express warranties with the parol evidence rules is not helpful to consumers who rely on oral warranties.<sup>160</sup> The Song-Beverly Act does not help in this area as it does not recognize oral warranties.<sup>161</sup> Since express written warranties are very difficult to disclaim under the California Commercial Code, the Song-Beverly Act does not significantly change the law.<sup>162</sup>

The California Commercial Code provides for the disclaimer of implied warranties in Section 2316. The disclaimer of merchantability must mention merchantability, and when there is a writing, the disclaimer must be conspicuous. To exclude or modify the implied warranty of fitness, there must be a writing, and the exclusion must be conspicuous.<sup>163</sup> Both of the implied warranties are also excluded by use of words like "as is," "with all faults" or other expressions which are commonly understood to call the buyer's attention to the fact that

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of remedies. See Boyd, *Representing Consumers—The Uniform Commercial Code and Beyond*, 9 ARIZ. L. REV. 372, 379 (1968).

155. CAL. COMM. CODE §2316(1).

156. This is usually known as a merger clause.

157. CAL. COMM. CODE §2202. The terms may be explained by course of dealing, usage of trade, or evidence of consistent additional terms.

158. *Klein v. Asgrow Seed Co.*, 246 Cal. App. 2d 87, 102, 54 Cal. Rptr. 609, 616 (1966). See also, Shanker and Abel, *Consumer Protection Under Article 2 of the Uniform Commercial Code*, 29 OHIO ST. L.J. 689, 693-95 (1968).

159. The test of admissibility of extrinsic evidence in California is not whether the contract appears plain on its face, but whether the extrinsic evidence is relevant to prove a meaning to which the language of the writing is reasonably susceptible. See *Stewart Title Co. v. Herbert*, 6 Cal. App. 3d 957, 85 Cal. Rptr. 654 (1970).

160. Comment, *supra* note 14, at 347-49. This is especially true with regard to the low-income consumer who is usually poorly educated. See Hester, *Deceptive Sales Practices and Form Contracts—Does the Consumer Have a Private Remedy?* 1968 DUKE L.J. 831.

161. CAL. CIV. CODE §1791.2(a)(1).

162. CAL. COMM. CODE §2316(1).

163. CAL. COMM. CODE §2316(2).

there are no implied warranties.<sup>164</sup> If the buyer has examined the goods before entering into the contract, or has refused to make an examination, there is no implied warranty against defects which should have been revealed to him in the course of the examination.<sup>165</sup>

The theory is that as long as the seller notifies the buyer, and the buyer theoretically agrees, the seller can disclaim all of the implied warranties.<sup>166</sup> The difficulty here, however, is at least partially in the word, "merchantability"—the disclaimer must use the "magic word" itself, the technical meaning of which is not understood by many consumers.<sup>167</sup> Most commentators argue that the consumer exercises little freedom of choice because he is unaware of the disclaimer or because he sees it but does not know what it means.<sup>168</sup> The Song-Beverly Act makes an important change by providing that manufacturers, distributors, or retailers may limit, modify, or disclaim implied warranties only so long as there is no express warranty given.<sup>169</sup>

The changes produced by the Song-Beverly Act<sup>170</sup> become more significant in light of its definition of "manufacturer" as one who manufactures, assembles or produces consumer goods.<sup>171</sup> This broad definition could mean that the manufacturer is liable to the consumer for the finished product, including the component parts which he buys from others.<sup>172</sup> For example, if General Motors gave an express warranty on a car, the consumer could look to *G.M.* if a tire was defective. The tire would have *G.M.*'s implied warranty of merchantability attaching to it because of the express warranty given on the car. One author suggests that this warranty could not be disclaimed, as a manufacturer could not give an express warranty as to one part of the goods and exclude warranties as to the other parts.<sup>173</sup> Disclaimers under the Song-Beverly Act must be made in a specific manner; a procedure which appears

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164. CAL. COMM. CODE §2316(3)(a).

165. CAL. COMM. CODE §2316(3)(b).

166. Comment, *supra* note 14, at 349.

167. Shanker, *supra* note 129, at 41.

168. Whitford, *supra* note 150 at 97-98. Prof. Whitford argues also that the disclaimer is not significant, either in settling cases, *Id.* at 102, or in deciding what remedy to pursue—warranty, negligence or strict liability, *Id.* at 106-07. He seems to be in a minority position among the textwriters.

169. Compare CAL. CIV. CODE §1793 with CAL. COMM. CODE §2316 (permitting disclaimers of implied warranties when an express warranty is given) and CAL. COMM. CODE §2317 (providing that if an express warranty displaces an implied warranty of merchantability, the implied warranty may be disclaimed under §2316).

170. *Id.*

171. CAL. CIV. CODE §1791(c).

172. See Thornton, *supra* note 73, at 333. The Song-Beverly Act does not, however, apply to equipment or component parts of systems designed to heat, cool or otherwise air condition where the system becomes a fixed part of a structure, unless the retailer gives an express warranty with regard to the component. CAL. CIV. CODE §1795.1.

173. Thornton, *supra* note 73 at 333.

to give the buyer more notice as to what is being disclaimed than is given under the California Commercial Code.<sup>174</sup> This procedure requires that a conspicuous writing be attached to the goods, which clearly informs the buyer in plain language of each of the following:

- (1) The goods are being sold on an "as is" or "with all faults" basis.
- (2) The entire risk as to the quality and performance of the goods is with the buyer.
- (3) Should the goods prove defective following their purchase, the buyer and not the manufacturer, distributor, or retailer assumes the entire cost of all necessary servicing or repair.<sup>175</sup>

A basic policy issue often raised is whether a disclaimer should be permitted at all. The Model Consumer Act says no, and many commentators agree.<sup>176</sup> Under the doctrine of strict liability in tort, the manufacturer is the one who put the product on the market and who should have the responsibility for it; no disclaimers are recognized.<sup>177</sup>

### *The Song-Beverly Act and Strict Liability in Tort*

The underlying public policy surrounding strict liability in tort is that the manufacturer is the one who marketed the product which created the risk of harm, and he is best able to distribute the resulting losses by charging higher prices for his products.<sup>178</sup> This policy recognizes the effects of the mass production and distribution system on the consumer, and to some degree equalizes the position of the consumer, in relation to corporate power.<sup>179</sup>

Although the plaintiff must still prove defect and causation, strict liability in tort is not limited by contract warranty exclusions or other statutory means by which a seller can limit his liability,<sup>180</sup> nor is the buyer required to give notice to avoid a bar to recovery.<sup>181</sup> California cases have extended the doctrine of strict liability to bystanders who have neither purchased nor used the product, but were injured by it.<sup>182</sup>

174. *Thompson*, Sept. 30, 1971.

175. CAL. CIV. CODE §1792.4(a).

176. NATIONAL CONSUMER ACT, A MODEL ACT FOR CONSUMER PROTECTION, prepared by the NATIONAL CONSUMER LAW CENTER, BOSTON COLLEGE LAW SCHOOL, Jan. 1970, §3.302. Shanker, *supra* note 129, at 44, suggests that there should be no disclaimers in the consumer goods area, as does the Commentator *supra* note 152, at 905.

177. See text accompanying note 178, *infra*.

178. Comment, *Products Liability—The Expansion of Fraud, Negligence and Strict Tort Liability*, 64 MICH. L. REV. 1329, 1333 (1966). Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1333 (1966).

179. Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077, 1086 (1965). The improper or undirected use of massive corporate power—both economic and technological—is the prime cause of unsafe and ineffective products. Turner, *Corporate Responsibility and Products Safety*, 8 SAN DIEGO L. REV. 15, 21 (1970).

180. Shanker, *supra* note 129, at 27.

181. CAL. COMM. CODE §2607(3)(a).

182. *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 586, 451 P.2d 84, 89, 75 Cal. Rptr. 652, 657 (1969); *Putensen v. Clay Adams, Inc.*, 12 Cal. App. 3d 1062,



The California courts have held the manufacturer strictly liable in tort even if there was a defective component or condition traced to others in the chain of distribution,<sup>183</sup> and have extended the doctrine to the wholesaler<sup>184</sup> and retailer as well.<sup>185</sup>

In strict liability cases, recovery has been allowed for personal injury and physical injury to property.<sup>186</sup> Whether or not strict liability permits recovery where there is mere economic loss is still in doubt. Two opposing views appear. In the case of *Santor v. A. & M. Karagheusian, Inc.*<sup>187</sup> the New Jersey Supreme Court held a carpet manufacturer liable to a consumer for the difference between the value of a defectively manufactured carpet and the purchase price paid. The considerations were held to be the same as in the personal injury cases: the consumer does not have the knowledge or opportunity to discover the defect, and when the manufacturer places the goods on the market, he becomes strictly liable in tort having undertaken an absolute obligation not only that they are safe, but that they are suitable for the intended use of the consumer.<sup>188</sup>

Shortly thereafter, the California Supreme Court rejected the extension of strict liability embodied in *Santor* when Chief Justice Traynor, in a significant statement of dictum, said that strict liability in tort could not be used for recovery of economic loss.<sup>189</sup> The Court distinguished the risk-spreading rationale of *Greenman* as being designed to cover physical injuries to person or property, but not to

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1072, 91 Cal. Rptr. 319 (1970); *Johnson v. Standard Brands Paint Co.*, 274 Cal. App. 2d 331, 338, 79 Cal. Rptr. 194 (1969).

183. *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964). California has adopted the standard of strict liability as promulgated in the Restatement of Torts and recognized the requirement that the product must be expected to, and ultimately does reach the consumer without a substantial change in its condition. This could avoid liability on the part of the manufacturer, or the maker of component parts if the condition of the item was substantially changed. See *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 475, 467 P.2d 229, 236, 85 Cal. Rptr. 629, 636 (1970).

184. *Canifax v. Hercules Powder Co.*, 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965).

185. *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 583, 451 P.2d 84, 87, 75 Cal. Rptr. 652, 655 (1969). *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 263, 391 P.2d 168, 171-72, 37 Cal. Rptr. 896, 899-900 (1964).

186. Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 924, (1966). This note defines economic harm as damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property. *Id.* at 918.

187. 44 N.J. 52, 207 A.2d 305, 16 A.L.R.3d 670 (1965).

188. We perceive no sound reason why the implication of reasonable fitness should be attached to the transaction and be actionable against the manufacturer where the defectively made product has caused personal injury, and not actionable when inadequate manufacture has put a worthless article in the hands of an innocent purchaser who has paid the required price for it.

*Id.* 44 N.J. at 56, 207 A.2d at 309.

189. *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

undermine the sales warranties governing the economic relationship between the supplier and the consumer.<sup>190</sup> Chief Justice Traynor said that *Santor* was decided correctly because there was a warranty given to the consumer, but it was inappropriate to base the opinion on strict liability in tort, without regard to what representations of quality were made by the manufacturer.<sup>191</sup> Justice Peters, in a concurring and dissenting opinion, stated that the strict liability theory should apply to economic loss, as it might result in the same kind of "overwhelming misfortune" that *Greenman* was designed to prevent in physical injury cases. He suggested that sales warranties should still govern "commercial" transactions, but that the "ordinary consumers" (the term needs judicial definition) should be allowed to recover under the strict liability theory. Defective products in terms of tort theory would be equatable to the merchantability concept of the Uniform Commercial Code, so that there would not be an unlimited spectrum of possible damages awaiting the manufacturer.<sup>191a</sup>

The current California law then, as set forth in *Seely v. White Motor Co.* puts physical harm to person or property in the law of tort, and commercial or economic losses in the law of sales warranties. This view, according to one author, appears to be the majority view for the United States,<sup>192</sup> despite the obvious fact that greater consumer protection would result from putting into effect the Peters' opinion, or the decision in *Santor*. This is because consumers are not usually concerned with loss of profits, but they are vitally interested in the cost of repairing or replacing defective products, even where such items do not cause physical harm. In these types of cases, the warranty provisions of the California Commercial Code or the Song-Beverly Act must be used for recovery.<sup>193</sup>

### *The Song-Beverly Act and Federal Law*

On November 8, 1971, the Magnuson-Moss Act was passed by the

190. *Id.* at 15, 403 P.2d at 149, 45 Cal. Rptr. at 21. See notes 96-98 *supra* and accompanying text for discussion of *Greenman*.

191. *Id.* at 17, 403 P.2d at 151, 45 Cal. Rptr. at 23.

191a. *Id.* at 19-29, 403 P.2d at 152-158, 45 Cal. Rptr. at 24-30.

192. McNulty, *Products Liability and the Uniform Commercial Code: The Third Party Beneficiary of Warranties is Alive and Well and Living in Illinois*, 51 CHI. BAR. REC. 339, 343-44 (1970). See also Note, *Products Liability—Recovery for Economic Loss*, 38 U. COLO. L. REV. 426, 427 (1966); Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases*, 18 STAN. L. REV. 974, 976-77 (1966).

193. CAL. COMM. CODE §2318, Comment 1. Although U.C.C. §2-318 was not adopted in California, it could be argued that since the U.C.C. sets forth only a minimum number of persons that warranties extend to, and allows the cases to develop further additions, this section of the Uniform Code is very similar to where California case law has developed. See U.C.C. §2-318(A)-(C), and see analysis in Rapson, *Products Liability Under and Beyond the U.C.C.*, 2 U.C.C. L.J. 315, 318, 325 (1970).

United States Senate.<sup>194</sup> This Act is designed to provide greater protection for consumers against deceptive practices, and to provide minimum standards for consumer product warranties.<sup>195</sup> The minimum standards for suppliers giving written warranties include: (1) repairing or replacing any malfunctioning or defective product covered by the warranty; (2) within a reasonable time; and (3) without charge.<sup>196</sup>

The Song-Beverly Act appears stronger than the Federal Act for several reasons. It requires the servicing to be done within 30 days, unless beyond the control of the manufacturer,<sup>197</sup> as opposed to the reasonable time provision of the Federal Act. The California Act provides for treble damages when an express warranty is willfully breached,<sup>198</sup> whereas the Federal Act provides only for recovery of actual and incidental damages.<sup>199</sup> Both Acts have a provision for reasonable attorney fees.<sup>200</sup> The greatest single difference in the two Acts is in the service provisions. The Song-Beverly Consumer Warranty Act provides for the maintenance of service facilities in California where a written express warranty is given.<sup>201</sup> The Federal Act has no such geographical provision for servicing the product in the state where it was purchased.

The Magnuson-Moss Act has not become law as of this writing. It is clear, though, that Congress has "the power to regulate; that is, to prescribe the rule by which interstate commerce is to be governed"<sup>202</sup> under the Commerce Clause of the Constitution and therefore has the power to pass this Act.<sup>203</sup> Initially there appeared to be a clear intent by the Congress to set forth uniform standards for warranties, and to pre-empt the field in this area,<sup>204</sup> thus excluding the Song-Beverly Act from the field.<sup>205</sup> To prevent this result, the Magnuson-Moss bill was amended to provide that state laws which afford greater protection to consumers than the Federal Act shall be exempt from its provisions, for as long as the state continues to effectively enforce the more stringent provisions, and as long as there is not an undue burden on interstate commerce.<sup>206</sup>

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194. S. 986, 92nd Cong., 1st Sess. (1971).

195. *Id.*

196. *Id.* §104.

197. CAL. CIV. CODE §1793.4.

198. CAL. CIV. CODE §1794(a).

199. S. 986, 92nd Cong., 1st Sess. §110(c) (1971).

200. CAL. CIV. CODE §1794(b); S. 986, 92nd Cong., 1st Sess. §110(c) (1971).

201. CAL. CIV. CODE §1793.2.

202. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

203. U.S. CONST., art. I, §8, cl. 3.

204. S. 986, 92nd Cong., 1st Sess. §§102-104, 109 (1971).

205. This would be done via the Supremacy Clause, U.S. CONST. art. VI, §2.

206. This is the Nov. 5, 1971 amendment sponsored by Senators Tunney, Cranston, Kennedy and Harris. This amendment was patterned after the amendment to the

The general rule for determining the validity of state statutes affecting interstate commerce has been phrased as follows:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.<sup>207</sup>

There is a substantial state interest in consumer protection, which has been recognized by the United States Supreme Court.<sup>208</sup> The Song-Beverly Act appears to regulate "evenhandedly," applying to everyone doing business in California who chooses to give a written express warranty.<sup>209</sup> The requirement of maintaining service facilities in the state, if held to be an undue burden on interstate commerce, could negate at least this section of the California Act. Here, the question is one of degree, as well as the availability of reasonable alternatives.<sup>210</sup> The manufacturer who chooses to give the express warranty can arrange with local retailers to provide for the servicing, so long as they are adequately compensated.<sup>211</sup> This would seem to be a minor inconvenience on the out of state manufacturer with servicing plants elsewhere. The interest is great; the burden is minor. This provision should not be considered to be an undue burden on interstate commerce.<sup>212</sup>

### Conclusion

Although the Song-Beverly Consumer Warranty Act is a step forward in terms of consumer protection, its provisions have yet to be tested by time and judicial interpretation. There are several areas in which problems are readily foreseeable. The idea of providing service facilities close to where the product was purchased is undoubtedly helpful to the consumer. However, if he buys the product in San Francisco and the facility is in Los Angeles, it would be more helpful to him if the manufacturer would be made to bear the shipping cost outside

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Clean Air Act of 1967, which exempted California from federal pre-emption in regulating emission standards, See Comment, *The Clean Air Amendments of 1970: Better Automotive Ideas from Congress*, 12 B.C. IND. & COM. L. REV. 571, 598-99 (1971).

207. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), *citing*, *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960).

208. *Head v. New Mexico Bd. of Examiners*, 374 U.S. 424 (1963); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Plumley v. Massachusetts*, 155 U.S. 461, 468 (1894).

209. CAL. CIV. CODE §1793.2.

210. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945).

211. CAL. CIV. CODE §§1793.2(2), 1793.5.

212. See generally, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Fry Roofing Co. v. Wood*, 344 U.S. 157 (1952); *Breard v. City of Alexandria*, 341 U.S. 622 (1951); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

a given radius of the purchase area. To give the manufacturer or retailer 30 days within which to repair the product should lessen the delay in doing warranty work. However, this will depend on how the courts interpret what is "beyond his control" to extend that time period.

Some of the Act's provisions appear straight-forwardly beneficial. The provision for reasonable attorney's fees not only helps the consumer but might also encourage attorneys to take more cases which previously seemed unprofitable. This same rationale applies to the treble damage provision for wilful breach of an express warranty. Treble damage recovery should also encourage the manufacturer, retailer or distributor to complete warranty work. The area of used goods is a relatively new one in terms of warranty protection. By placing some of the Act's remedies at the disposal of the consumer of used goods, he is in a far better position than he was under the Commercial Code. The new protections given the consumer are several. One of the most significant benefits of the Act is the elimination of any privity requirement between the manufacturer and the consumer.

Broad protection is also afforded consumers by the Act's provision eliminating the disclaimer of implied warranties when an express warranty is given. In attempting to more clearly notify the consumer when all of the warranties are being disclaimed, the consumer should be able to make a more intelligent decision when purchasing consumer goods. This of course, presupposes that the buyer has a real choice, and that all manufacturers covered by the Act do not decide to disclaim all of the warranties.

The full impact which the Act will have on consumers is not yet known. There has been very little publicity surrounding the Act. Products still come with written warranties directing the buyer to ship the goods out of state for repair. The disclaimer changes have gone into effect, but so far there has been no reaction from consumers. Nevertheless, the Act has further subrogated the interest of the producer to the paramount interest of the consumer and Adam Smith and California consumers should feel some measure of deserved satisfaction.

*Eileen K. Jenkins*