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NOTES & COMMENTS

THE MAGNUSON-MOSS WARRANTY—FEDERAL TRADE COMMISSION IMPROVEMENT ACT: PROTECTING CONSUMERS THROUGH PRODUCT WARRANTIES

The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act,¹ effective July 4, 1975, is designed to expand the consumer protection capabilities of the Federal Trade Commission (FTC).² The Act amends the Federal Trade Commission Act³ by altering the jurisdictional⁴ and rule-making⁵ powers of the FTC. The Act also establishes requirements for written warranties⁶ thus representing a congressional effort to modify, for the consumer's benefit, certain aspects of the Uniform Commercial Code (U.C.C.).⁷ However,

¹ 15 U.S.C. §§ 45(m), 46(a)-(b), (g)-(h), 49, 50, 52, 56, 57a, 57b, 57c, 58 [hereinafter referred to as the FTCIA], 2301-2312 [hereinafter referred to as the Magnuson-Moss Act] (Supp. IV, 1974). The combination of the Magnuson-Moss Act and the FTCIA will hereinafter be referred to as the Act.

² H.R. REP. No. 1107, 93d Cong., 2d Sess. 20 (1974), *reprinted at* 1974 U.S. CODE CONG. & ADM. NEWS 7702.

³ 15 U.S.C. §§ 41-58 (1970).

⁴ Pub. L. No. 93-637, § 201 (Jan. 4, 1975) *amending* 15 U.S.C. §§ 45, 46(a)-(b), and 52 (1970). This amendment replaces the words "in commerce" with "in or affecting commerce." Congress sought to align the jurisdictional power of the FTC with that of other federal agencies. H.R. REP. No. 1107, 93d Cong., 2d Sess. 30 (1974), *reprinted at* 1974 U.S. CODE CONG. & ADM. NEWS 7712. The jurisdictional power of the FTC had been restricted since 1941 by the Supreme Court's holding in *FTC v. Bunte Bros.*, 312 U.S. 349 (1941). The court there held that a Congressional amendment was necessary to expand the jurisdictional scope of the Act. *Id.* at 355.

⁵ 15 U.S.C. § 57a (Supp. IV, 1974). The Act authorizes the FTC to promulgate rules regarding disclosure of warranty terms, *id.* § 2302(a), *see text* accompanying notes 56-63 *infra*; pre-sale availability of warranty terms, *id.* § 2302(b)(1)(A), *see text* accompanying notes 118-121 *infra*; and informal dispute settlement mechanisms, *id.* § 2310(a)(2), *see text* accompanying notes 98-108 *infra*.

⁶ The Magnuson-Moss Act additionally creates remedies for breach of warranty. *See text* accompanying notes 64-117 *infra*.

⁷ Congress recognized a pressing need for change in the law regulating warranties because the U.C.C., which comprises the law of sales, was ineffective in the area of consumer protection. Congress noted that under the U.C.C. "the bold print giveth and the fine print taketh away." H.R. REP. No. 1107, 93d Cong., 2d Sess. 24 (1974), *reprinted at* 1974 U.S. CODE CONG. & ADM. NEWS 7706. *See text* accompanying notes 49-55 *infra*.

these amendments are not the first attempt by Congress to make the FTC an agency for consumer protection.

In 1914 Congress established the FTC to supplement existing federal antitrust legislation.⁸ Section 5 of the Federal Trade Commission Act⁹ declared that unfair methods of competition were unlawful. The Supreme Court strictly construed this language,¹⁰ holding that consumers were not protected in the absence of an injury to competition.¹¹ In 1938 Congress amended § 5 of the Act¹² to alleviate this problem by adding the words "unfair or deceptive acts or practices in commerce."¹³ However, this extension of the FTC's powers did not effect a significant increase in its ability to protect consumers,¹⁴ because the FTC has failed to identify the most important consumer problems.¹⁵ Consequently, Congress has acted "to provide the Federal Trade Commission (FTC) with means of better protecting consumers. . . ."¹⁶ The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act is an attempt to make the FTC "directly responsive to the needs of the American consumer."¹⁷ Congress

⁸ See generally, G. HENDERSON, *THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE* (1924); Thompson, *Highlights in the Evolution of the Federal Trade Commission*, 8 GEO. WASH. L. REV. 257 (1939).

⁹ 15 U.S.C. § 45 (1970).

¹⁰ *FTC v. Raladam Co.*, 283 U.S. 543 (1931).

¹¹ As one commentator noted, "[T]he interest of the public was subordinated to that of competitors, since the Commission could not act where a monopoly existed or where all competitors were using the same practices." Note, *Federal Trade Commission Act—Amendments Under the Wheeler—Lea Act*, 16 N.Y.U.L.Q. REV. 121, 122 (1938).

¹² Act of Mar. 21, 1938, Pub. L. No. 447 § 3, 52 Stat. 111, amending 15 U.S.C. § 45 (1934).

¹³ 15 U.S.C. § 45 (1938). For a discussion of the Congressional purposes for the amendment see, Note, *The Federal Trade Commission Act of 1938*, 39 COLUM. L. REV. 259 (1939).

¹⁴ See generally, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969); E. COX, R. FELLMETH & J. SCHULZ, *THE 'NADER REPORT' ON THE FEDERAL TRADE COMMISSION* (1969).

¹⁵ REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 37 (1969). It has been further suggested that "cronyism" played a significant role in the FTC's failure to function as an effective consumer protection agency because it provided the agency with incompetent employees on decision-making levels. See E. COX, R. FELLMETH & J. SCHULZ, *THE 'NADER REPORT' ON THE FEDERAL TRADE COMMISSION* 170 (1969).

¹⁶ H.R. REP. NO. 1107, 93d Cong., 2d Sess. 20 (1974), reprinted at 1974 U.S. CODE CONG. & ADM. NEWS 7702.

¹⁷ 120 CONG. REC. S21978 (daily ed. Dec. 18, 1974) (remarks of Senator Magnuson).

expects that the FTC will effectively implement the powers which it has been granted by the Act.¹⁸

However, whether the FTC will fully implement the expansive consumer protection provisions of the Act is not clear. There are already conflicts between the Magnuson-Moss Act and the FTC rules proposed pursuant to § 102 of the Act.¹⁹ For example, under the Act, "consumers" are buyers of consumer products and persons to whom the product is transferred.²⁰ Yet the FTC has proposed a rule which requires disclosure of any limitation on the enforceability of the warranty "by any person other than the first purchaser at retail."²¹ Seemingly, the FTC does not consider the category of transferees very extensive. Under the proposed rule a warrantor would not be liable to any person who bought the consumer good from the initial purchaser, if the warrantor conspicuously disclosed the limitation at the initial sale of the product. This is contrary to the Congressional intent to include in the definition of consumer "any person to whom such [consumer] product is transferred during the duration of the warranty. . . ."²²

A second conflict between Congressional purpose and FTC implementation arises from the FTC's apparent recognition of a condition precedent to warranty coverage²³ which would be contrary to § 104(b)(1) of the Act.²⁴ The Act specifically allows two conditions precedent to warranty coverage.²⁵ Consumers may be required to give notice of the defect to the warrantor,²⁶ and they may be required to deliver the product to the warrantor free and clear of liens.²⁷ The

¹⁸ Senator Magnuson stated that:

No longer will the Federal Trade Commission be confined to slapping the wrists of persons who engage in unfair or deceptive practices and telling them not to do it again. The bill authorizes the Federal Trade Commission to not only bring a halt to unfair or deceptive acts or practices but also to go into court and ask a judge to order consumer redress for those people who have been injured by such acts or practices.

Id. at S21977.

¹⁹ 15 U.S.C. § 2302 (Supp. IV, 1974).

²⁰ *Id.* § 2301(3).

²¹ 40 Fed. Reg. 29893, proposed as Rule 16 C.F.R. § 701.3(b) (1975).

²² H.R. REP. No. 1107, 93d Cong., 2d Sess. 35 (1974), reprinted at 1974 U.S. CODE CONG. & ADM. NEWS 7717.

²³ 40 FED. REG. 29893, proposed as Rule 16 C.F.R. § 701.3(g) (1975).

²⁴ 15 U.S.C. § 2304(b)(1) (Supp. IV, 1974).

²⁵ Additional conditions may be allowed if the warrantor can demonstrate to the FTC that they are necessary. *Id.*

²⁶ *Id.*

²⁷ This requirement may not be imposed on the consumer if the FTC determines

FTC's proposed rules, however, allow a third condition precedent to warranty coverage. Consumers may be required to return warranty registration cards in order to be covered by the warranty.²⁸ Until the rules become final and the FTC begins to enforce them, the FTC's efforts to comply with Congressional intent cannot be evaluated. Generally, the confusion engendered by the Act and the FTC's proposed rules can be clarified only by judicial interpretation of such terms as "consumer,"²⁹ "transferee,"³⁰ and "warrantor."³¹ Clarification of these terms is essential to the successful operation of the consumer protection devices established by Congress.

The major Congressional devices for protecting consumers are the designation of the kind of warranty,³² a prohibition of the disclaimer of implied warranties when a written warranty is given,³³ and the disclosure of information on the face of the warranty.³⁴ The disclosure and designation requirements established by the Magnuson-Moss Act are conditioned on the retail cost of the product.³⁵

The Act requires written warranties³⁶ to be designated as either

that it would be impracticable. *Id.* § 2304(b)(2).

²⁸ 40 Fed. Reg. 29893, proposed as Rule 16 C.F.R. § 701.4 (1975). The effect which these cards may have on a consumer class action taken under 15 U.S.C. § 2310(d) (Supp. IV, 1974) is discussed in the text accompanying notes 84-101 *infra*.

²⁹ See text accompanying notes 20-22 *supra*.

³⁰ *Id.*

³¹ A "warrantor" includes "any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty." 15 U.S.C. § 2301(5) (Supp. IV, 1974). A "supplier" is any person "engaged in the business of making a consumer product directly or indirectly available to consumers." *Id.* § 2301(4). The effect of the interaction of these definitions may be to hold manufacturers liable for defects which arise solely because of improper installation of the product. *Hearings on H.R. 20 and H.R. 5021 Before the Sub-Comm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess., ser. 17, 166-178 (1973) (Remarks of Mr. Thomas Nichol, Jr., General Counsel, Gas Appliance Mfrs. Ass'n.).

³² 15 U.S.C. § 2303 (Supp. IV, 1974). See text accompanying notes 36-48 *infra*.

³³ 15 U.S.C. § 2308 (Supp. IV, 1974). See text accompanying notes 49-55 *infra*.

³⁴ 15 U.S.C. § 2302 (Supp. IV, 1974). See text accompanying notes 56-63 *infra*.

³⁵ Section 102(e) of the Act states that the disclosure requirements set forth in that section apply "only to warranties which pertain to consumer products actually costing the consumer more than \$5." *Id.* § 2302(e). Section 103(d) of the Act states that the designation requirements for warranties automatically govern consumer goods actually costing more than \$10. *Id.* § 2303(d).

³⁶ The Magnuson-Moss Act defines a written warranty as:

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

“full” or “limited” when consumer goods actually cost³⁷ more than \$10. “Full” warranties are those which meet or exceed minimum requirements set forth in § 104(a) of the Magnuson-Moss Act.³⁸ A full warranty requires the warrantor to remedy defects in consumer products “within a reasonable time and without charge.”³⁹ The warrantor must also allow the consumer to elect either a refund or a replacement of the defective product if it is not successfully repaired after a reasonable number of attempts.⁴⁰ Moreover, the consumer will not be required to pay for the replacement of the product or any part thereof.⁴¹ These requirements make full warranties more responsive to consumer transactions by imposing the responsibility for a defective product on the warrantor.

The minimum standards for a full warranty also include a prohibition against the limitation of the duration of any implied warranties. This assures warranty protection for consumers until the statute of limitations bars an action by the consumer against the warrantor.⁴² In addition, full warranties may not limit consequential

a specified level of performance over a specified period of time, or (B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

Id. § 2301(6). Subsection (A) is similar to the provision for written warranties in U.C.C. § 2-313(1)(a). Subsection (B) of the Magnuson-Moss Act, unlike U.C.C. § 2-313, emphasizes the relationship between the consumer and the warrantor more than does the U.C.C. However, the requirement that the “affirmation, promise, or undertaking becomes a basis of the bargain” is the same in the Magnuson-Moss Act and in U.C.C. § 2-313.

³⁷ “Actual cost” is not intended to include any imposts such as sales taxes. H.R. REP. NO. 1107, 93d Cong., 2d Sess. 36 (1974), *reprinted at* 1974 U.S. CODE CONG. & ADM. NEWS 7718.

³⁸ 15 U.S.C. § 2304(a) (Supp. IV, 1974).

³⁹ *Id.* § 2304(a)(1).

⁴⁰ The FTC is authorized to specify by rule “what constitutes a reasonable number of attempts to remedy particular kinds of defects or malfunctions under different circumstances.” *Id.* § 2304(a)(4).

⁴¹ *Id.*

⁴² *Id.* § 2304(a)(2). Implied warranties are those which arise under state law. *Id.* § 2301(7). These are: (1) the implied warranty of merchantability, U.C.C. § 2-314, and (2) the implied warranty of fitness for a particular purpose, U.C.C. § 2-315. The duration of these warranties is generally set by the contract statute of limitations because the injury suffered by the consumer is of a commercial nature. 3 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 40.01[1] (1975). U.C.C. § 2-725(1) states that “an

damages for breach of warranty unless the limitation is conspicuously disclosed on the warranty.⁴³ Any warranty designated as full is considered to include these minimum standards.⁴⁴ By specifying the minimum requirements of a full warranty Congress has made full, written warranties uniform and understandable for consumers.⁴⁵

Written warranties which do not meet the minimum standards for full warranties must be designated as "limited."⁴⁶ Under a limited warranty, the duration of an implied warranty⁴⁷ may be limited to that of the express warranty if the limitation is conscionable.⁴⁸ Thus, while a full warranty does not allow any limitation on the duration of an implied warranty, a limited warranty does.

Under the Magnuson-Moss Act, when a written warranty is given, implied warranties may not be disclaimed, regardless of the warranty designation.⁴⁹ This prohibition essentially negates U.C.C. § 2-316, the section which permits the disclaimer of implied warranties,⁵⁰ as it applies to written warranties.⁵¹ U.C.C. § 2-316 was drafted "to protect a buyer from unexpected and unbargained language of disclaimer"⁵² However, it does not always attain that end.⁵³ To the extent that U.C.C. § 2-316 and the Magnuson-Moss Act overlap, the prohibition against the disclaimer of implied warranties will solve the problem of consumers purchasing goods with an implied warranty disclaimer clause attached. A warrantor who provides a consumer

action for breach of any contract for sale must be commenced within four years after the cause of action accrued."

⁴³ 15 U.S.C. § 2304(a)(3) (Supp. IV, 1974). U.C.C. § 2-719(3) provides for the limitation of consequential damages.

⁴⁴ 15 U.S.C. § 2304(e) (Supp. IV, 1974).

⁴⁵ *Id.* § 2302. See text accompanying notes 56-63 *infra*.

⁴⁶ *Id.* § 2303(a)(2).

⁴⁷ See note 42 *supra*.

⁴⁸ 15 U.S.C. § 2308(b) (Supp. IV, 1974).

⁴⁹ *Id.* § 2308(a).

⁵⁰ The U.C.C. states that "all implied warranties are excluded by expressions like 'as is,' 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." U.C.C. § 2-316(3)(a).

⁵¹ Section 2-316 provides for the disclaimer of implied warranties without regard to the type of warranty given on the product. Express warranties created orally, written warranties, and implied warranties may all be disclaimed. U.C.C. § 2-316.

⁵² *Id.* Comment (1).

⁵³ See, e.g., *Chrysler Corp. v. Wilson Plumbing Co.*, 132 Ga. App. 435, 208 S.E.2d 321 (1974); *Turner v. International Harvester Co.*, 133 N.J. Super. 277, 336 N.E.2d 62 (1975). See also, West, *Disclaimer of Warranties—Its Curse and (Possible) Cure*, 76 Com. L.J. 253 (1971); Note, *Disclaimer of Warranty in Consumer Sales*, 77 HARV. L. REV. 318 (1963).

with a written warranty on a consumer product can no longer disclaim the implied warranties which result from the sale. However, the Magnuson-Moss Act applies *only* when the warranty given is written.⁵⁴ If no warranty is given or if it is given orally,⁵⁵ U.C.C. § 2-316 remains in effect and implied warranties may be disclaimed. Thus the Magnuson-Moss Act disclaimer provision can be circumvented to the ultimate damage of the consumer. Sellers of consumer goods may refuse to warrant their products with written instruments and, consequently, may avail themselves of the disclaimer provision in the U.C.C. The result may be the sale of consumer goods without any warranties at all.

An additional device for consumer protection is the requirement that warrantors disclose certain information on the face of the warranty.⁵⁶ For example, consumers will be made aware of the existence of certain manufacturer's settlement devices⁵⁷ through the disclosure on the warranty.⁵⁸ Section 102 of the Act⁵⁹ authorizes the FTC to promulgate rules for disclosure of the terms of warranties "to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products."⁶⁰ The FTC rules proposed under this section seek "to ensure that consumers obtain warranty performance on their own behalf."⁶¹ The consumer will be able to identify the warrantor⁶² and ascertain the procedure he must follow to procure performance of warranty obligations.⁶³ These proposed disclosure requirements provide consumers with all the information necessary to initiate their claims against warrantors.

Once these claims are instituted, various remedies are available to the consumer and the FTC.⁶⁴ In analyzing the remedies established

⁵⁴ 15 U.S.C. § 2308(a) (Supp. IV, 1974).

⁵⁵ U.C.C. § 2-313 does not require a writing for the creation of an express warranty. See, e.g., *Boehm v. Fox*, 473 F.2d 445 (10th Cir. 1973); *Capital Equip. Enterprises, Inc. v. North Pier Terminal Co.*, 177 Ill. App. 2d 264, 254 N.E.2d 542 (1969).

⁵⁶ The general information to be disclosed includes the name and address of the warrantor, the time when the warranty commences, and the part or parts of the product covered or excluded from coverage under the warranty. 40 Fed. Reg. 29893, proposed as Rule 16 C.F.R. § 701.3 (1975).

⁵⁷ See text accompanying notes 101-112 *infra*.

⁵⁸ 40 Fed. Reg. 29893, proposed as Rule 16 C.F.R. § 701.3(i) (1975).

⁵⁹ 15 U.S.C. § 2302 (Supp. IV, 1974).

⁶⁰ *Id.* § 2302(a).

⁶¹ 40 Fed. Reg. 29892 (1974).

⁶² See note 58 *supra*.

⁶³ 40 Fed. Reg. 29893, proposed as Rule 16 C.F.R. § 701.3(h) (1975).

⁶⁴ See text accompanying notes 80-130 *infra*.

by the Act, the courts might be guided by the contrast between the U.C.C. and the Magnuson-Moss Act. While there are some similarities,⁶⁵ variations in the statutory definitions illuminate a different emphasis in the Magnuson-Moss Act and in the U.C.C. Illustrative of this is the use of merchant—non-merchant terminology in the U.C.C., and consumer—warrantor terminology in the Magnuson-Moss Act. When particular knowledge or skills are required, the U.C.C. imposes on merchants standards which are different from those which govern non-merchants.⁶⁶ In other situations, no distinction is made between merchants and non-merchants.⁶⁷ For example, under the U.C.C. the duty of seasonably notifying the seller of rejection of goods rests equally on merchant and non-merchant buyers.⁶⁸ However, merchant-buyers of large quantities of goods are better able to provide measures for inspection of newly delivered goods than are occasional buyers of goods for personal consumption.⁶⁹ Thus the U.C.C. regulates and emphasizes commercial transactions.⁷⁰

Conversely, the Act protects consumers from unfair or deceptive acts or practices.⁷¹ The Act extends its protection only to consumers⁷²

⁶⁵ See, e.g., the comparison of the definition of written and express warranties in note 36 *supra*.

⁶⁶ U.C.C. § 2-104, Comment (2) sets forth three situations where the requirements of the U.C.C. apply only to merchants. The first situation is the formation of a contract where the Statute of Frauds, *id.* § 2-201(2), firm offers, *id.* § 2-205, and modification of the contract, *id.* § 2-209(2), are more flexible for merchants than non-merchants. The rationale is that the activities subject to these sections are "typical of and familiar to any person in business." *Id.* § 2-104, Comment (2). Second, only a person who regularly deals with a certain type of goods is able to provide a warranty of merchantability. *Id.* § 2-314(1). The assumption is that through dealing with a certain type of goods, the merchant becomes aware of possible defects and can insure against the sale of these defective products more easily than the seller who is unfamiliar with such merchandise. Finally, merchants are subject to a more rigorous standard of good faith than are non-merchants. Compare *id.* § 2-103(b) with *id.* § 1-201(19).

⁶⁷ See, e.g., *id.* § 2-711. Merchants and non-merchants are afforded the same remedies for breach of contract. Merchants and non-merchants are also treated equally by U.C.C. § 2-316, regarding the disclaimer of implied warranties, even though the bargaining positions of the two parties are not comparable. See cases cited note 57 *supra*.

⁶⁸ U.C.C. § 2-609(1). See text accompanying notes 75-76 *infra*.

⁶⁹ Cf. *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring).

⁷⁰ U.C.C. § 1-102(2)(a) states that one of the underlying purposes of the U.C.C. is "to simplify, clarify and modernize the law governing commercial transactions."

⁷¹ 15 U.S.C. §§ 45 and 2302 (Supp. IV, 1974).

⁷² The Magnuson-Moss Act defines consumers as:

a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration

when purchasing consumer goods.⁷³ Therefore unlike the U.C.C., the Magnuson-Moss Act does not affect sales between merchants. Furthermore, the remedies made available by the Act operate mainly to protect consumers in their dealings with warrantors.⁷⁴

The Magnuson-Moss Act permits consumers to bring an action against a warrantor who injures them by failing to comply with the provisions of Title I of the Act.⁷⁵ This is a striking contrast to the U.C.C. Under U.C.C. § 2-602(1), a buyer may reject those goods which do not meet the warranty standards, but this is not a reasonable alternative for consumers because the buyer must notify the seller of his rejection of the goods within a reasonable time.⁷⁶ Consumers often do not become aware of the defect in the product until a lengthy period of time after the purchase of the goods. The consumer then fails to give reasonable notice, which results in acceptance⁷⁷ of the

of an implied or written warranty . . . applicable to the product, and any other person who is entitled . . . to enforce against the warrantor . . . the obligations of the warranty.

Id. § 2301(3). The protection afforded by the Act is triggered by the sale of consumer goods to a consumer. The U.C.C. does not generally distinguish between merchants and non-merchants in particular types of commercial transactions. *See* note 68 *supra*.

⁷³ The Magnuson-Moss Act defines consumer products as:

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

Id. § 2301(1).

In contrast, the U.C.C. defines consumer goods as those which are "used or bought for use primarily for personal, family, or household purposes." U.C.C. § 9-109(1). The U.C.C. considers its four categories of goods—consumer, equipment, farm products, and inventory—as mutually exclusive. Thus, "a radio is inventory in the hands of a dealer and consumer goods in the hands of a householder." *Id.* § 9-109, Comment (2). The NATIONAL CONSUMER ACT, First Final Draft (1970) § 1.301(8), proposed by Professional Staff, National Consumer Law Center, Boston College Law School, does not make any such distinction.

⁷⁴ Merchants may also be awarded relief pursuant to § 206 of the Act. 15 U.S.C. § 57b(b) (Supp. IV, 1974).

⁷⁵ *Id.* § 2310(d).

⁷⁶ U.C.C. § 2-602(1).

⁷⁷ Acceptance is defined in U.C.C. § 2-606. Acceptance occurs when the buyer, "after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity." U.C.C. § 2-606(1)(a). Acceptance may also occur within a reasonable time after an ineffective rejection or if the buyer does any act inconsistent with the seller's ownership. In the context of a consumer sales transaction, acceptance is likely to occur simply because the consumer is satisfied with the product at the time he

goods. Other remedies are provided by the U.C.C., however they too are generally inadequate for consumers.⁷⁸

The Magnuson-Moss Act retains and supplements these remedies.⁷⁹ Section 110(d) of the Act⁸⁰ provides for consumer suits, which may be brought as a class action in federal district court, against warrantors who have not complied with the provisions of the Act. Under the U.C.C., buyers who wish to bring a class action against a seller may do so in state courts⁸¹ or, if diversity of citizenship exists,

purchases it and puts the product to its intended use. The consumer does not notify the seller of any non-conformity of the goods to the contract (including the warranty) within a reasonable time, thereby failing to properly reject the goods. Acceptance of the goods occurs by operation of law after the buyer has then had a "reasonable opportunity to inspect them." U.C.C. § 2-606(1)(b).

⁷⁸ The buyer may revoke his acceptance and proceed against the seller as if he had rejected the goods. Section 2-608 states that:

The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it . . .

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

U.C.C. § 2-608(1)(b). The buyer may cancel the sales contract and recover any money he has already paid. In addition to recovering so much as has been paid to the seller, the buyer may "cover" and seek damages as determined under U.C.C. § 2-712. However, this remedy is not generally feasible for consumers. Unlike the resale of non-conforming "widgets," the resale of a single broken toaster is a difficult task. Consequently, the "cover" remedy provided by the U.C.C. is not an effective tool for consumers.

This does not, however, preclude the buyer from recovering. More likely, the buyer will justifiably revoke his acceptance and recover any loss resulting in the ordinary course of events from the seller's breach. U.C.C. § 2-714(1). Under U.C.C. § 2-714(2), damages are the difference between the value of the goods as accepted and the value of the goods as conforming to the warranty. This formula would not allow recovery under circumstances common to consumer sales. If the product is not defective at the time of acceptance, it conforms to the warranty. The two values are the same, and therefore there are no damages. When the consumer purchases the product it is usually in perfect working order and only after a product is used for a time does it become defective. A measure of damages which is more appropriate to consumer transactions is the value of conforming goods minus the value of the defective goods. Whatever formula the courts use in arriving at a proper amount of damages, the position of the buyer and the nature of the loss should be of primary importance. Additionally, the buyer may recover consequential and/or incidental expenses when appropriate. *See* U.C.C. § 2-715.

⁷⁹ 15 U.S.C. § 2311(b)(1) (Supp. IV, 1974).

⁸⁰ *Id.* § 2310(d).

⁸¹ *See*, Note, *Consumer Class Actions With a Multi-State Class: A Problem of Jurisdiction*, 25 HASTINGS L.J. 1411, 1423-24 (1974).

in federal courts.⁸² A class action in federal court, based on diversity, cannot proceed unless every member of the class has a claim in excess of \$10,000.⁸³ Individual consumer claims are usually closer to \$25 than they are to \$10,000.⁸⁴ Thus if the only option open to a class of consumers is a suit based on diversity of citizenship, no action can be brought at all. However, Congress has limited this jurisdictional obstacle through the Magnuson-Moss Act. Since the Act regulates commerce, subject matter jurisdiction is based on 28 U.S.C. § 1337⁸⁵ which gives the federal district courts original jurisdiction of actions brought under an Act of Congress regulating commerce. Under the Magnuson-Moss Act the total amount in controversy must be \$50,000 or more and there must be at least 100 named plaintiffs⁸⁶ for the action to proceed as a class action. Individual claims of \$25 or more may be aggregated to meet the \$50,000 requirement.⁸⁷

Despite the congressional assistance provided to consumers by § 110(d) of the Act,⁸⁸ consumer class actions may be frustrated by the recent Supreme Court holding in *Eisen v. Carlisle & Jacqueline*⁸⁹ which construed the notice requirement of Rule 23 of the Federal Rules of Civil Procedure,⁹⁰ emphasizing the importance of individual notice.⁹¹ The Court declared that "notice and an opportunity to be heard were fundamental requisites of the constitutional guarantee of procedural due process."⁹² If the members of the class are unascertainable through reasonable efforts, individual notice will not be required.⁹³ This ascertainment may produce a serious financial burden

⁸² 28 U.S.C. § 1332(a) (1970).

⁸³ See *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). In *Zahn* the court held that any plaintiff whose claim does not satisfy the jurisdictional amount required must be dismissed from the action. *Id.* at 301. For a discussion of alternatives to the type of class action instituted by the plaintiffs in *Zahn*, see Kirkpatrick, *Consumer Class Litigation*, 50 ORE. L. REV. 21 (1970).

⁸⁴ Bangs, *Revised Rule 23: Aggregation of Claims for Achievement of Jurisdictional Amount*, 10 B. C. IND. & COM. L. REV. 601 (1969); Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B. C. IND. & COM. L. REV. 501 (1969); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

⁸⁵ 28 U.S.C. § 1337 (1970).

⁸⁶ 15 U.S.C. § 2310(d)(3) (Supp. IV, 1974).

⁸⁷ *Id.*

⁸⁸ *Id.* § 2310(d).

⁸⁹ 417 U.S. 156 (1974).

⁹⁰ FED. R. CIV. P. 23(c)(2).

⁹¹ 417 U.S. at 173-77.

⁹² *Id.* at 174.

⁹³ FED. R. CIV. P. 23(c)(2).

for plaintiffs with limited resources. Nevertheless, in the legislative history of the Act, Congress suggested that the courts carefully evaluate the plaintiff's financial position when deciding the proper notice to be given to the class.⁹⁴ However, under the FTC's proposed rules, warrantors may require consumers to return warranty registration cards as a condition to warranty coverage.⁹⁵ This will provide the warrantor with a ready list of those persons who are covered by the warranty. This list could be obtained by the named plaintiffs in a class action at a minimal cost. Actual notice to each member of the class would, therefore, apparently be required.

A prerequisite to the maintenance of any action under § 110(d) of the Act⁹⁶ is that the consumer, or class of consumers, must initially submit the dispute to an informal settlement mechanism if the warrantor has established one.⁹⁷ Although Congressional policy is to encourage warrantors to establish such mechanisms,⁹⁸ they need not do so. The purpose of the mechanisms, which are free to consumers,⁹⁹ is to settle complaints fairly and expeditiously.¹⁰⁰ The FTC has proposed rules setting forth minimum requirements for the mechanisms.¹⁰¹ The decision of the mechanism is not legally binding,¹⁰² but the warrantor must act in good faith in determining whether to abide by the result.¹⁰³ There is no comparable provision for consumers. To ensure that the mechanisms attain their goal of fair and expeditious dispute settlement, the FTC proposed a rule that the consumer would

⁹⁴ H.R. REP. No. 1107, 93d Cong., 2d Sess. 42 (1974), reprinted at 1974 U.S. CODE CONG. & ADM. NEWS 7724.

⁹⁵ 40 Fed. Reg. 29893, proposed as Rule 16 C.F.R. § 701.4 (1975).

⁹⁶ 15 U.S.C. § 2310(d) (Supp. IV, 1974).

⁹⁷ Subsection (a)(3) of § 110 of the Act states that warrantors may establish informal dispute settlement mechanisms. 15 U.S.C. § 2310(a)(3) (Supp. IV, 1974).

⁹⁸ *Id.* § 2310(a)(1).

⁹⁹ 40 Fed. Reg. 29897, proposed as Rule 16 C.F.R. § 703.3(a) (1975).

¹⁰⁰ 15 U.S.C. § 2310(a)(1) (Supp. IV, 1974).

¹⁰¹ 40 Fed. Reg. 29896-99, proposed as Rules 16 C.F.R. §§ 703.1-703.8 (1975).

If there are less than three persons deciding a dispute, they shall have no direct involvement in the manufacture, distribution, sale or service of any product. If three or more members of a mechanism are deciding a dispute, two-thirds may not have any direct involvement. 40 Fed. Reg. 29897, proposed as Rule 16 C.F.R. § 703.4(b) (1975).

"Direct involvement" shall not include acquiring or owning an interest solely for investment, and the acquisition or ownership of an interest which is offered to the general public shall be prima facie evidence of its acquisition or ownership solely for investment." *Id.*

¹⁰² *Id.* § 703.5(j). The decision of the mechanism is admissible in evidence in a subsequent judicial action on the same claim. 15 U.S.C. § 2310(a)(3) (Supp. IV, 1974).

¹⁰³ 40 Fed. Reg. 29897, proposed as Rule 16 C.F.R. § 703.2(g) (1975).

not be required to submit to the mechanism process if a decision was not made within 40 days after the date the consumer first notified the mechanism of his complaint.¹⁰⁴ The settlement procedure is also subject to scrutiny for fairness by the FTC either on its own initiative or after a written complaint by any person.¹⁰⁵ The good faith requirement imposed upon warrantors, the proposed time limit for the completion of claim settlement, and the FTC power to investigate the mechanisms for fairness represent an excellent attempt to provide consumers with a fast, simple procedure for settling claims. However, the lack of a requirement that consumers abide in good faith by unfavorable mechanism decisions may present a problem. If consumers refuse to follow unfavorable mechanism decisions, a potentially helpful consumer protection device will be lost because warrantors may discontinue ineffective mechanisms.¹⁰⁶

In addition to consumer class actions and private settlement, the FTC may act on behalf of consumers who have been injured by warrantors.¹⁰⁷ Section 206 of the FTCIA¹⁰⁸ authorizes the FTC to commence a civil action against anyone violating a rule regarding unfair or deceptive practices under the Act.¹⁰⁹ When an action is brought by the FTC under this section, the court must give notice to those persons allegedly injured by the defendant's actions. Those persons wishing to be represented by the FTC in the action must notify the court and they will be allowed to share in the relief awarded.¹¹⁰ If a person agrees to FTC representation, any subsequent action by the consumer against the defendant in the FTC action on the same claim would be barred.¹¹¹ However, if the consumer is not represented by the FTC, he may bring an individual suit.¹¹² Therefore, unlike a con-

¹⁰⁴ *Id.* § 703.5(e).

¹⁰⁵ 15 U.S.C. § 2310(a)(4) (Supp. IV, 1974).

¹⁰⁶ If consumers do not abide by unfavorable mechanism decisions, complaints will not be settled fairly and expeditiously and the primary purpose of the mechanism will consequently be thwarted. Therefore, there would be no reason for warrantors to continue funding the mechanisms.

¹⁰⁷ 15 U.S.C. § 57b(b) (Supp. IV, 1974). The FTC may bring an action on behalf of all injured parties, not just consumers. Thus, competitors of the defendant could also be represented by the FTC.

¹⁰⁸ *Id.* § 57b.

¹⁰⁹ *Id.* § 57b(a)(1). This power does not apply to violations of interpretive rules set out by the FTC or to rules which the FTC has said do not constitute unfair or deceptive acts or practices.

¹¹⁰ *Cf.* S. CONF. REP. No. 1408, to accompany S. 356, 93d Cong., 2d Sess. 41 (1974), reprinted at 1974 U.S. CODE CONG. & ADM. NEWS 7773.

¹¹¹ *Id.*

¹¹² *Id.*

sumer class action, the notice requirement for FTC actions may be by publication¹¹³ and will not violate any due process requirements.

The FTC may institute the same type of suit after issuing a final cease and desist order against any person whose conduct is of such a nature that "a reasonable man would have known [the acts were] dishonest or fraudulent."¹¹⁴ In both of these situations, the court may grant whatever relief is necessary to remedy the injury caused by the deceptive acts.¹¹⁵ If this method of securing consumer redress is fully utilized, it will provide a substantial step forward in consumer protection. The FTC's capacity to protect consumers has been enhanced significantly by this affirmative function in addition to its regulatory powers.

The FTC's regulatory power includes the agency's ability to seek a preliminary restraining order against warrantors who make deceptive warranties¹¹⁶ or otherwise fail to comply with the Magnuson-Moss Act.¹¹⁷ Previously, the FTC was authorized to seek preliminary injunctions against false advertising only.¹¹⁸ Warranties must be made available to the consumer before the sale,¹¹⁹ and hence they act

¹¹³ 15 U.S.C. § 57b(c)(2) (Supp. IV, 1974). See text accompanying notes 92-100 *supra*.

¹¹⁴ *Id.* § 57b(a)(2).

¹¹⁵ *Id.* § 57b(b). Although this subsection seemingly provides the courts with wide discretion in the determination of relief, "nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages." *Id.* Initially, it appears that punitive damages are proper when the defendant has engaged in acts or practices that a reasonable man would consider dishonest or fraudulent. Since the FTC has not promulgated a rule regarding the practice the businessman has engaged in, Congress apparently does not intend to punish him unduly. The presence of a rule alleviates uncertainty as to what the FTC considers to be unfair or deceptive. Therefore, extensive relief for practices which are not subject to an FTC rule is reasonable only when the practices are dishonest or fraudulent.

¹¹⁶ A deceptive warranty is:

(A) a written warranty which (i) contains an affirmation, promise, description, or representation which is either false or fraudulent, or which, in light of all of the circumstances, would mislead a reasonable individual exercising due care; or (ii) fails to contain information which is necessary in light of all of the circumstances, to make the warranty not misleading to a reasonable individual exercising due care; or (B) a written warranty created by use of such terms as "guaranty" or "warranty," if the terms and conditions of such warranty so limit its scope and application to deceive a reasonable individual.

Id. § 2310(c)(2).

¹¹⁷ *Id.* § 2310(c)(1).

¹¹⁸ See Note, "Corrective Advertising" Orders of the Federal Trade Commission, 85 HARV. L. REV. 477, 486 (1971).

¹¹⁹ The availability to consumers of warranty instruments prior to sale performs

as advertisements for the product. Thus the similarities between false advertising and deceptive warranties sustain the extension of the false advertising control power.

In addition to these powers, the FTC may bring an action in federal district court to recover a civil penalty against violators of the Act.¹²⁰ The violator must have actual or constructive knowledge that his activity is unfair and prohibited by a rule.¹²¹ Civil penalties may also be assessed against anyone who violates a final cease and desist order¹²² with knowledge that the unfair or deceptive act is unlawful.¹²³ Each violation subjects the defendant to civil penalties of up to \$10,000.¹²⁴ However the new procedure regarding violations of final cease and desist orders is the same as that previously followed by the FTC. A complaint is issued by the FTC to the respondent and a hearing takes place before an examiner. His decision is subject to review by the FTC. If a violation is found, a cease and desist order is issued. The order becomes final 60 days after its issuance or 60 days after its affirmance on appeal to a United States Court of Appeals. If the final order is violated, civil penalties may be assessed.¹²⁵ The result of this three-step process is delay, and FTC attempts to accelerate enforcement or to increase protection by means of informal, voluntary methods of compliance have failed.¹²⁶ Therefore, the addi-

an advertising function in that consumers may base their choice of purchase on a comparison of warranties, just as a comparison of the advertisement of products may also form the basis of purchase decisions.

¹²⁰ 15 U.S.C. § 45(m)(1)(A) (Supp. IV, 1974).

¹²¹ *Id.*

¹²² *Id.* § 45(m)(1)(B).

¹²³ *Id.* § 45(m)(1)(B)(2).

¹²⁴ *Id.* § 45(m)(1)(B).

¹²⁵ *Id.*

¹²⁶ The voluntary methods of compliance have been severely criticized:

The voluntary methods of enforcement permit commercial wolves to take not just one 'free bite' (as is the case even with cease and desist orders since they also do not inflict penalties for past offenses) but two or three.

As actually administered, voluntary enforcement is even more inadequate than it seems. Trade-regulation rules and assurances are often poorly drafted, the rules sometimes too broad (no more than restatements of the statutes they are supposed to elucidate), the assurances too narrow (forbidding only a *specific* deceptive activity, ignoring other likely tactics). The advisory opinions that business calls upon the FTC for are frequently given with inadequate background information. And, like trade-regulation rules, they tend to be mere paraphrases of vague statutory language.

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tion of civil penalties for rule violations enhances the consumer protection capabilities of the FTC's cease and desist power.¹²⁷ This power is not helpful to consumers who have already been injured by a deceptive practice. Rather, it operates to deter warrantors from engaging in unfair acts. Proper utilization of this power along with the power to obtain damages on behalf of persons injured by violators of the Act will increase consumer protection.

The passage of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act evinces more of a congressional policy than a master plan for consumer protection. Until many of the definitions which the Act sets forth are given judicial form, businessmen will have to act without knowledge of the implications of their actions.¹²⁸ The FTC's authority to commence civil actions represents a chance for effective consumer protection. However, the availability of class actions under § 110(d) of the Act is unclear. It too may be a significant tool for consumer redress if the procedural problems can be overcome.

Nevertheless, if the prohibition against the disclaimer of implied warranties induces warrantors to refrain from warranting their products,¹²⁹ the net effect of the Act will be a reduction in current consumer protection. Ironically, the ultimate effectiveness of this consumer protection scheme rests on the business world. If the Act inspires competition in the marketplace and thereby causes more sup-

COMMISSION 62 (1969). These voluntary methods of enforcement are assurances of voluntary compliance and informal corrective actions. "Assurances of Voluntary Compliance" . . . are signed agreements between potential respondents and the FTC." REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 22 (1969). Persons signing these agreements are required to submit a compliance report to the FTC within 6 months after the agreement. No independent investigations are undertaken to determine if there has actually been compliance with the agreement. *Id.* at 25. Informal corrective actions include, "exchanges of letters and purely verbal assurances of discontinuance." *Id.* at 22. "The FTC makes no effort whatever to secure compliance with ICA's [informal corrective actions]." *Id.* at 25.

¹²⁷ By subjecting rule violators to the possibility of civil penalties, Congress has presented the FTC with powers which may be employed to expedite consumer redress and avoid lengthy cease and desist actions. Moreover, rules issued by the FTC may be brought to bear on a wide range of persons, while the cease and desist order method is more piecemeal in its application.

¹²⁸ See, e.g., the dilemma of gas appliance dealers, note 31 *supra*.

¹²⁹ Members of the Association of Home Appliance Manufacturers have indicated that they are considering dropping their existing warranties altogether. B.N.A. ANTI-TRUST TRADE REG. REP., No. 717, A-7 (1975).

pliers to offer "full" warranties,¹³⁰ the goals of the Act will be attained.^{131*}

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¹³⁰ 120 CONG. REC. S21977 (daily ed. Dec. 18, 1974) (remarks of Senator Magnuson).

¹³¹ One goal of the Act is to provide better consumer protection. H.R. REP. NO. 1107, 93d Cong., 2d Sess. 20 (1974), reprinted at 1974 U.S. CODE CONG. & ADM. NEWS 7702. There may be further problems with the Act in addition to warrantors withdrawing their written warranties. The general consensus which has emerged from the hearings on the FTC's proposed rules is that "the net result of the FTC rulemaking effort will be consumer confusion and complication of warranty terms beyond consumer comprehension." B.N.A. ANTITRUST TRADE REG. REP., No. 731, A-1 (1975). Nevertheless, until warranties are given and the FTC's rules become effective, the ability of the Act to provide consumer protection cannot be determined.

* The FTC promulgated final rules under the Magnuson-Moss Act on December 31, 1975. The rules which govern the disclosure of the terms and conditions of written warranties and the pre-sale availability of these warranties become effective on December 31, 1976. The rules which regulate the informal dispute settlement mechanisms become effective July 4, 1976.

The final rules provide that the disclosure and designation requirements imposed on warrantors apply only when the consumer product being purchased actually costs more than \$15. 40 Fed. Reg. 60188-89 (1975). This replaces the \$5 and \$10 limits set forth in the Act. See note 35 *supra*. The final rules have also clarified the definitions of "consumer" and "consumer product." "Products which are purchased solely for commercial or industrial use" are not "consumer products" under these rules. 40 Fed. Reg. 60188 (1975). Likewise, "consumers" do not include persons who are purchasing "consumer products" for "use in the ordinary course of the buyer's business." *Id.* These clarifications will exclude products which would have been warranted under the proposed rules due to their normal usage and regardless of the purchaser or the intended use of the product. See note 73 *supra*.

The final rules relative to informal dispute settlement procedures have altered the proposed rules only slightly. The mechanism established by the warrantor must still render a decision within 40 days after the submission of a claim to it. See text accompanying note 104 *supra*. However, the mechanism may now postpone the decision for an additional 7 days if "the consumer has made no attempt to seek redress directly from the warrantor." 40 Fed. Reg. 60217 (1975). The final rules also provide the warrantor with an extra 5 working days in which to perform any obligations due under a mechanism decision or settlement with a consumer, which occurred after notification to the mechanism of the defect in the product. The proposed rules would have required the mechanism to ascertain within 5 working days whether or not the warrantor complied with the settlement or decision. 40 Fed. Reg. 29898, proposed as Rule 16 C.F.R. § 703.5(h) (1975). The final rules extend this period to 10 working days. 40 Fed. Reg. 60217 (1975).

